CONFIDENTIAL MATERIAL EXCLUDED

BEFORE THE

FEDERAL MARITIME COMMISSION

Docket No. 11-12

HANJIN SHIPPING CO., LTD.;
KAWASAKI KISEN KAISHA, LTD.;
NIPPON YUSEN KAISHA;
UNITED ARAB SHIPPING COMPANY (S.A.G.); and
YANG MING MARINE TRANSPORT CORPORATION,

COMPLAINANTS

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

RESPONDENT

COMPLAINANTS' REPLY TO PORT AUTHORITY'S RESPONSE TO COMPLAINANTS' STATEMENT OF FACTS NOT IN DISPUTE AND PORT AUTHORITY'S STATEMENT OF ADDITIONAL FACTS

I. COMPLAINANTS' REPLY TO THE PORT'S RESPONSE TO COMPLAINANTS' "STATEMENT OF FACTS NOT IN DISPUTE"

Identity of Parties and Jurisdiction

1. Each of the Complainants is an ocean common carrier within the meaning of the Shipping Act, 46 U.S.C. §§ 40102(6) and (17). At all times material to this complaint, each

Complainant has operated vessels as an ocean common carrier in the United States foreign commerce subject to the Shipping Act.

RESPONSE: Disputed to the extent Complainants suggest that their business is limited to using and operating vessels to transport cargo containers and non-containerized cargo across the ocean. Complainants are highly integrated global shipping and logistics companies that coordinate the transportation of cargo containers and/or non-containerized cargo from its point of origin, across the ocean, through port infrastructure, and inland to its ultimate destination. See Declaration of Brian Kobza, dated February 1, 2013 ("Kobza Decl."), ¶ 8; see also Declaration of Reed Collins, dated February 1, 2013 ("Collins Decl."), ¶¶ 3, 4 & Ex. B (printouts from websites of Hanjin Shipping Co. ("Hanjin"), Kawasaki Kisen Kaisha, Ltd. ("'K' Line"), and Nippon Yusen Kaisha's ("NYK")), Ex. C (printouts from website of Yang Ming Marine Transport Corp. ("Yang Ming")); Opposition to Motion to Compel, dated January 10, 2013 ("Opp. to MTC"), at 4-6. One aspect of Complainants' business enterprises is the operation of vessels as ocean common carriers within the meaning of the Shipping Act, 46 U.S.C. § 40102(6) and (17). See Opp. to MTC at 4.

Complainants concede that their role in the movement of cargo is not limited to the operation of the vessel. See, e.g., Opp. to MTC at 4 (admitting that "Complainants, while fundamentally vessel operators who load, carry and discharge containers, do subcontract the movement of cargo under through bills of lading to and from inland points"). Complainants also provide "through transportation" of cargo containers (or non-containerized cargo). See Kobza Decl. ¶12; Opp. to MTC at 4 ("Complainants provide port to port transportation under 'berth terms' as well as intermodal through transportation of containerized cargo") (emphasis added). "Through transportation" is defined by the Shipping Act as a combination of ocean and inland

transportation. See 46 U.S.C. § 40102(25) (defining "through transportation"). When "through transportation" is provided, the vessel-operating carrier remains responsible for coordinating the movement of the cargo container (or non-containerized cargo) until it reaches its final destination by ground transport. See Kobza Decl. ¶12. The ocean common carrier typically charges the beneficial cargo owner ("BCO") or non-vessel operating common carrier ("NVOCC") that arranges the shipment a single rate plus any surcharges that covers both ocean and inland transportation. See 46 U.S.C. § 40102(25) (noting that a "through rate" must be charged for "through transportation"); 46 U.S.C. § 40102(24) (defining "through rate" as a "single amount charged by a common carrier in connection with through transportation"); see also Kobza Decl. ¶ 13, Exs. A-K (copies of examples of Complainants' publicly available through bills of lading). Ocean common carriers also contract with railroads and/or trucking companies to provide inland transportation of cargo containers. See Kobza Decl. ¶14; Opp. to MTC at 4-5 (conceding that Complainants "subcontract the movement of cargo under through bills of lading to and from inland points" and have been providing such intermodal through transportation services "for about fifty years"); Collins Decl. ¶ 3 & Ex. B (printouts from Hanjin's website) (noting that Hanjin provides inland transportation/distribution services by truck and railway), Ex. B (printouts from "K" Line's website) ("K" Line "provide[s] total logistics services meeting the growing diversity and complexity of logistics needs -including . . . truck transportation") (emphasis added). The exact extent to which the Complainants' business involves inland movement of cargo containers and/or non-containerized cargo would be set forth in the Complainants' contracts with BCOs. Kobza Decl. ¶15. Complainants have thus far refused to produce these contracts. See Rule 56(d) Declaration of Jared Friedman, dated February 1, 2013, ¶23.

Complainants' Reply: There is no dispute of material fact. Complainants have never suggested that they do not provide through transportation (i.e., service to or from an inland point, as opposed to the marine terminal) for some shipments to and from the Port. As the Commission knows well, through transportation has been a ubiquitous service option since the beginning of FMC-regulated container shipping. While Complainants do not themselves move cargo inland over roads or rails, Complainants have also stated that, for shipments under through bills of lading, Complainants subcontract the movement of that cargo to and from inland points to motor and rail carriers. These undisputed facts are clearly set forth in the Port's owns evidence, especially that Kobza Decl. ¶9-15, entirely undercutting the Port's claims that more discovery is needed to chase imagined factual disputes.

2. Respondent is a marine terminal operator within the meaning of 46 U.S.C. § 40102(14), FMC Organization No. 002021.

RESPONSE: No dispute. The Port Authority is a body corporate created by compact as a bi-state port district between the states of New York and New Jersey with consent of Congress. See Declaration of Peter Zantal, dated February 1, 2013 ("Zantal Decl."), ¶5; see also (Corrected Answer, filed September 7, 2011 ("Answer")) at p. 3; Complaint. filed August 5, 2011 ("Compl.") at p. 3.

Complainants' Reply: No dispute.

Organization and Use of Facilities at the Port

3. Respondent leases most of its marine terminal facilities to private terminal operators who operate container terminals located at the Port and who provide marine terminal services and facilities to ocean common carrier vessels calling at the Port.

RESPONSE: Disputed to the extent that Complainants' statement purports to summarize accurately the contents of the "about-port.html" page of the Port Authority's website, which Complainants cite and summarize in vague terms. What the Port Authority's website actually states is that the Port Authority "leases most of its terminal space to private terminal operators, which manage the daily loading and unloading of container ships." Complainants' Ex. 6 (http://www.panynj.gov/port/about-port html) (emphasis added).[1]

Further disputed to the extent Complainants imply that the Port Authority does not provide services and/or benefits in, about, and at the leased terminals. The Port Authority provides and maintains facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. See, e.g., Zantal Decl. ¶¶110, 34, 41 & Ex. 8 (The Port Authority's Guide, revised Sept. 17, 2009) (describing some of the infrastructure, intermodal transportation, and security projects provided by the Port Authority) (PA-CFC-00000239-255). Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See Complainants' Motion for Judgment, filed December 6, 2012 ("Mot. for J.") at 13; see also Opp. to MTC at 2.

[1] Citations to "Complainants' Ex." refer to Complainants' exhibits to their statement of facts, unless a different source or declaration is specified.

Complainants' Reply: There is no dispute of material fact. Complainants do not contest that the Port provides "facilities, infrastructure, roadways and intermodal transportation network, as well as security," including the lengthy list of projects referenced in Exhibit 8 to the Zantal Declaration (The Port Authority's Guide, revised Sept. 17, 2009). The diverse projects cited in that Exhibit 8 include:

REDACTED

Complainants strongly object to the suggestion that they have attempted to obscure any facts. The Port is not assessing the CFC for any specific service or item of infrastructure; rather it is being collected with the intention of covering the costs of a diverse and non-specific basket of past, present and future projects, including unspecified future projects. (Zantal Decl. Ex. 8). Accordingly, any assessment of the economic impacts of the Port's many undertakings on vessel operators is an impossibility.

The Port references the Zantal Declaration ¶ 34 for the proposed fact that its "capital investment in the facilities, infrastructure, roadways, and intermodal transportation network projects and services, as well as the provision of security. These improvements and services allow carriers that use either leased or public terminal space at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently through the port after the cargo containers and/or non-containerized cargo have been unloaded from the vessels en route to their final in-land destination (or for outbound cargo containers and/or non-containerized cargo, before they are loaded onto the berthed vessels)." While there is not a dispute of material facts, Complainants clarify this point by pointing out that (as all parties recognize above in response to ¶ 1) Complainants are not truck or rail carriers, but they do for some shipments subcontract inland transportation to such carriers. Complainants do not dispute that certain of the Port's facilities, infrastructure, roadways and intermodal transportation network may in certain cases enable such road and rail carriers to operate more quickly, safely and/or efficiently.

4. The Port furnishes none of the services provided to Complainants at those leased terminals.

RESPONSE: Disputed. Private marine terminal operators ("MTOs") provide certain services to Complainants, primarily stevedoring and daily loading and unloading of container ships. See, e.g., Complainants' Ex. 6 (http://www.panynj.gov/port/about-port.html); see also Complainants' Ex. 7 (Stevedoring and Terminal Services Agreement between COSCO Container Lines Co., Ltd., Kawasaki Kisen Kaisha, Ltd., Yang Ming Marine Transport Corp., Hanjin Shipping Co., Ltd., and United Arab Shipping Company and Maher Terminals LLC ("Maher")); Complainants' Ex. 8 (NYK agreements with Global Terminal and Container Services, LLC ("Global Terminal"), New York Container Terminal, Inc. ("NYCT"), and Port Newark Container Terminal ("PNCT")).

The Port Authority provides different services and/or benefits to Complainants, which are separate and distinct from the services performed by private MTOs. Zantal Decl. ¶41. The services and benefits provided by the Port Authority include the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶3.

Complainants' Reply: There is no dispute of material fact. Complainants have not asserted that the Port does not provide "facilities, infrastructure, roadways and intermodal transportation network, as well as security" in the port region. See supra ¶3. Respondent's tactic is to label these general "benefits" as a service provided to carriers. This does not create an issue of fact.

5. The Port also maintains and operates public berths. Roll-on/roll-off vessels that transport vehicles transiting the Port dock at the Port's public berths, where private stevedores furnish loading/discharging services.

RESPONSE: Disputed to the extent Complainants imply that the Port Authority does not provide services and/or benefits in, about, and at the Port Authority's public berths. Most of the non-containerized cargo (including vehicles, bulk, and break-bulk cargo) coming into and out of the port use terminal space at public berths that has not been leased to private marine terminal operators ("MTOs"). Zantal Decl. ¶7; see also Complainants' Ex. 6 (http://www.panynj.gov/port/about-port.html). The Port Authority provides services and/or benefits in, about, and at its public berths, which are separate and distinct from the services and benefits provided by private stevedores. Zantal Decl. ¶41. The Port Authority provides and maintains facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶3-4.

Complainants' Reply: There is no dispute of material fact. Complainants are not contesting the Port's authority to charge fees (such as wharfage and dockage) for the use of the Port's public wharves. Complainants have not contested the Port's general assertion that the Port

"provides and maintains facilities, infrastructure, roadways and intermodal transportation network." See supra ¶¶3-4.

6. REDACTED

RESPONSE: No dispute.

7. All terminal services (as defined by 46 CFR § 525.1) furnished to Complainants' container vessels within the Port limits are provided by private marine terminal operators at their leased facilities.

RESPONSE: Disputed to the extent Complainants imply that the Port Authority does not provide services and/or benefits in, about, and at the leased facilities. Private MTOs furnish the services enumerated in 46 CFR § 525.1 to Complainants' vessels; however, 46 CFR § 525.1 does not purport to contain an exhaustive listing of terminal services. See 46 CFR § 525.1. The Port Authority provides services and benefits which are separate and distinct from the services provided by private MTOs. The services and benefits provided by the Port Authority include the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and

attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶3-5.

Complainants' Reply: No dispute of material fact; see supra ¶ 5 above. Complainants object to the extent the Port's Response calls for a legal conclusion as to whether the non-specific "provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network" are Marine Terminal Services for the purposes of 46 C.F.R. § 525.1 or for the purposes of jurisdiction under the Act.

8. No services are provided to Complainants' container vessels by the Port Authority. There is no privity or other contractual or commercial relationship between Complainants and Respondents relating to their container vessel services.

RESPONSE: Disputed. The Port Authority provides services and benefits in, about, and at leased and public terminals, including the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. These services and benefits are separate and distinct from the services provided by private MTOs and stevedores. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶ 3-5, 7.

Complainants are deemed to be in privity with the Port Authority through implied contracts by virtue of their use of and benefit from the facilities, infrastructure, roadways and intermodal transportation, as well as security services and projects provided by the Port

Authority. 46 CFR §525.2(a)(2) ("Any schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving services rendered by the marine terminal operator...") (emphasis added).

Complainants' Reply: Although the Port is purposefully vague about what its "provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network" entails, or what "services" it purports to provide thereon, there does not appear to be any real dispute as to the material facts. Complainants have not contested that the Port maintains and develops regional transportation infrastructure, which includes investments in public roads, rail, bridges, airports and other areas. See supra ¶¶ 3-4. Cargo moving to or from marine terminals at the Port likely will be carried by a motor carrier (which may – or may not – be contracted for by the ocean carrier) over some of this regional shoreside transportation infrastructure. There is no evidence however, that CFC payments are used to pay for such activities or that dropping the rail user fee in favor of the CFC benefited those activities.

Complainants object to the legal argument that, although they do not have actual contract or direct dealings with the Port, they are "deemed to be in privity with the Port Authority through implied contracts by virtue of their use of and benefit from the facilities, infrastructure, roadways and intermodal transportation, as well as security services and projects provided by the Port Authority. 46 CFR §525.2(a)(2)." This is a disputed issue of law, rather than a factual issue.

9. Respondent explained in a description of the CFC: **REDACTED**

[redacted]

RESPONSE: No material factual dispute as to the cited language appearing in the text of the document cited. [redacted]

REDACTED

Complainants' Reply: See supra ¶8; there appears to be no actual dispute that the Port expends funds on the provision and maintenance of (not-specifically-identified) facilities, infrastructure, roadways and intermodal transportation network. Complainants object to the extent the Response argues or calls for a legal conclusion as to the existence of implied contractual or commercial relationships.

10. In addition to container vessels, Complainants "K" Line and NYK Line also operate non-container vessels, i.e., roll-on/roll-off ("ro/ro") vessels for the carriage of vehicles and other wheeled cargo.

RESPONSE: No dispute.

11. Such ro-ro vessels call at Respondent's public berths.

RESPONSE: No dispute.

12. At public berths where Complainants' non-container vessels berth, stevedoring is provided by private stevedoring companies; Complainants' vessels do not use services furnished

by, or participated in, by the Port in connection with loading, handling or discharging containers and/or non-containerized cargo.

RESPONSE: Disputed to the extent Complainants are asserting that the Port Authority does not provide Complainants with services and/or benefits. Private stevedoring companies provide loading and unloading services to Complainants at public berths. The Port Authority provides services and benefits which are separate and distinct from the services provided by private stevedoring companies. The services and benefits provided by the Port Authority include the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶ 3-5, 7-9.

Complainants' Reply: There is no factual dispute. The "attempts to obscure" reference is laughable, as the Port admits it is not funding any specific service or item of infrastructure; rather the CFC is being collected with the intention of covering the costs of a diverse, broad and non-specific basket of past, present and future projects.

Marine Terminal Tariffs

13. The Port publishes a Tariff covering all of its public berths. It is published at http://www.panynj.gov/port/tariffs/html.

RESPONSE: Disputed to the extent Complainants are suggesting the Tariff is only applicable at public berths. The Tariff is applicable at both private and public berths. See

Complainants' Ex. 10 (Tariff) at Subrule 34-1200 (providing that "Mins fee shall apply . . . at Port Authority leased and public berths") (emphasis added).

Complainants' Reply: The publication of the so-called "Tariff" is undisputed. The "Tariff" speaks for itself; any issue regarding its application is a legal one for the Commission, not a factual dispute.

14. The marine terminal operators who lease and operate the containerized terminals at the Port are: New York Container Terminal, APM Terminals, Maher Terminals, Port Newark Container Terminal, Global Marine Terminal and American Stevedoring Inc.

RESPONSE: No material dispute, except that American Stevedoring Inc. no longer operates a terminal at the port. The Port Authority also has an operating agreement with Red Hook Container Terminal LLC ("RHCT") through March 2013. Zantal Decl. ¶8.

Complainants' Reply: No dispute.

15. The private marine terminal operators which serve Complainants' container vessels publish their own tariffs covering the rates and conditions of their services at their leased facilities.

RESPONSE: Disputed to the extent that Complainants' statement suggests that the rates and conditions covering the services provided by private MTOs are contained exclusively in published tariffs. The private MTOs that serve Complainants' container vessels also have contracts or agreements with the Complainants, which supersede the rates and conditions set forth in the published tariffs. See Complainants' Statement of Facts Not in Dispute, filed December 6, 2012 ("Complainants' SOF") (discussing the interplay between MTOs' tariffs and

private contracts), ¶55; see also Complainants' Ex. 7 (Stevedoring and Terminal Services Agreement between COSCO Container Lines Co., Ltd., Kawasaki Kisen Kaisha, Ltd., Yang Ming Marine Transport Corp., Hanjin Shipping Co., Ltd., and United Arab Shipping Company and Maher Terminals LLC ("Maher")); Complainants' Ex. 8 (NYK agreements with Global Terminal, NYCT, and PNCT). The rates and conditions of these private MTOs do not and could not limit the ability of the Port Authority to publish its own tariffs covering the rates and conditions for the services and benefits provided by the Port Authority. See Complainants' Ex. 10 (Tariff) at Subrule 34-090 (explaining that the Tariff applies at leased terminals so long as "provision is made in the lease for application of said Rules and Regulations for leased premises"). The leases issued by the Port Authority to Global Terminals, Maher, NYCT and PNCT contain clauses making the Port Authority's rules and regulations applicable at the leased premises. Zantal Decl. ¶9 & Ex. 1 (Global Terminal Lease No. LPJ-001, dated June 23, 2010, available at http://www.panynj.gov/corporate-information/pdf/port-lease-global.pdf) (providing that the Port Authority's Rules and Regulations are applicable at Global Marine's leased terminal) ¶16(a), Ex. 2 (Maher Terminals Lease No. EP-249, dated Oct. 1, 2000, available at http://www.panynj.gov/corporate-information/pdf/port-lease-maher-terminals.pdf) (providing that the Port Authority's Rules and Regulations are applicable at Maher's leased terminal) ¶12(a), Ex. 3 (Maher Terminals Lease No. EP-251, dated Sept. 1, 2001) (providing that the Port Authority's Rules and Regulations are applicable at Maher's leased terminal) (PACFC00053837-878) 1 3(a), Ex. 4 (NYCT (formerly "Howland Hook Marine Terminal") Lease No. HHT-4, June 30, 1995, available at http://www.panynj.gov/corporate-information/pdf/portlease-howland-hook.pdf) (providing that the Port Authority's Rules and Regulations are applicable at NYCT's leased terminal) ¶12(a), Ex. 5 (NYCT Lease No. HHT-6, Mar. 31, 2004) (providing that the Port

Authority's Rules and Regulations are applicable at NYCT's leased terminal) (PA-CFC00054575-629) 9C 3(a), Ex. 6 (PNCT Terminal Lease No. L-PN-264, dated Dec. 1, 2000) (providing that the Port Authority's Rules and Regulations are applicable at PNCT's leased terminal) (PA-CFC00056957-251) 9C 12(a).

Complainants' Reply: No dispute as to factual assertions, provided however Complainants object to Respondents legal arguments and conclusions that the "rates and conditions of these private MTOs do not and could not limit the ability of the Port Authority to publish its own tariffs covering the rates and conditions for the services and benefits provided by the Port Authority," and the "leases issued by the Port Authority to Global Terminals, Maher, NYCT, and PNCT contain clauses making the Port Authority's rules and regulations applicable at the leased premises."

16. Maher Terminal Marine Terminal Schedule No. 010599 is published at http://www.maherterminals.com/index.cfm/do/page.tariff/.

RESPONSE: No dispute.

17. New York Terminal Conference Marine Terminal Schedule No. 011408, applicable at RHCT, Global Terminal & Container Services, New York Container Terminal, Port Newark Container Terminal and Universal Maritime Service Corp is published at http://www.newytc.com.

RESPONSE: No dispute.

Terminal Tariff Provisions Regarding the CFC

18. Section H of the Tariff, effective March 14, 2011, set forth a Cargo Facility Charge ("CFC") and complete subrules for imposing and enforcing the CFC.

RESPONSE: No dispute.

19. Subrule 34-1200 of Section H of the Port's Tariff defines the CFC, effective March 14, 2011, to apply to "all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port leased and public berths."

RESPONSE: No dispute.

20. The Tariff imposes a CFC of $4.95 per TEU of "Container Cargo," and "any containers larger than forty-feet shall be considered to be the equivalent of two TEUs."

RESPONSE: Disputed to the extent that Complainants' statement offers a legal interpretation of the Tariff. The Tariff imposes a charge of $4.95 per TEU on cargo containers. See Complainants' Ex. 10 (Tariff) at Subrule 34-1210.

Complainants' Reply: No factual dispute, the language of the "Tariff" speaks for itself. Complainants' statement offered no legal interpretation of the "Tariff"; rather, it quoted Subrule 34-1210, which states:

CARGO FACILITY CHARGE – RATES

Container cargo	$4.95 per TEU*
Vehicles	$1.11 per unit/vehicle
Bulk cargo, break-bulk cargo, general cargo, heavy-lift cargo and other special cargo	$0.13 per metric ton

*Any containers larger than forty-feet shall be considered to be the equivalent of two TEUs.

21. For Vehicles, the rate is $1.11 per unit/vehicle; for bulk cargo, break-bulk cargo, general cargo, heavy-lift cargo and other special cargo, it is $0.13 per metric ton.

RESPONSE: No dispute.

22. In Subrule 34-1210, the fee is assessed on "container cargo"; however, in Subrule 34-1200, the CFC is made applicable to "all cargo containers."

RESPONSE: Disputed to the extent that Complainants' statement offers a legal interpretation of the Tariff and to the extent it suggests that the Tariff is internally inconsistent. Subrule 34-1210 of the Tariff sets out the applicable rates for the CFC. The rate for "container cargo" is $4.95 per TEU. See Complainants' Ex. 10 (Tariff) at Subrule 34-1210. TEU is a volume measurement based on the size of the container, irrespective of the weight of its contents. Declaration of Fredrick Flyer and Allan Shampine, dated January 31, 2013 ("Flyer/Shampine Supp. Decl."), Appendix C (Declaration of Fredrick Flyer and Allan Shampine, dated Dec. 9, 2010 (the "Compass Lexecon Report") (explaining that "[c]ontainers come in different sizes. For comparison purposes, container volumes are often expressed in 'twenty foot equivalent units' ('TEUs'), which is the number of twenty foot containers required to ship the same volume. The Port [Authority] assumes that the average ratio of TEUs to containers is 1.7") (PACFC00000001-052) at 003 note 5. The CFC is assessed on all cargo containers, non-containerized cargo and vehicles upon discharge or loading onto vessels at the Port Authority's leased and public berths. See Tariff at Subrule 34-1200. The obligation to pay the CFC is triggered by the movement of the cargo container itself through the port, without regard to its

weight or contents (if any). See Complainants' Ex. 10 (Tariff) at Subrule 34-1200. All cargo containers (full or empty) and non-containerized cargo, benefit from the CFC-funded infrastructure projects and security services that allow carriers to move cargo containers and non-containerized cargo through the port more quickly, safely, and efficiently. Zantal Decl. 21.

Complainants' Reply: There is no dispute of material fact. Complainants' statement simply quoted the language of the "Tariff," it did not offer a legal interpretation of the "Tariff." The legal significance and interpretation of the varied terms that the Port uses in its "Tariff," and the issue of whether the "Tariff" is ambiguous or internally inconsistent in its reference to terms such as "Container cargo," and "cargo containers" are legal issues for resolution by the Commission, not factual disputes.

23. In practice, Respondent has taken the position that the CFC is charged on all containers, including empty containers (rather than just cargo in loaded containers).

RESPONSE: No material factual dispute except that this was not a "position" taken "in practice," but was expressly made part of the published Tariff. The Tariff provides that the CFC "shall apply to all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port Authority leased and public berths." See Complainants' Ex. 10 (Tariff) at Subrule 34-1200 and Subrule 34-1220(3)(a)(ii) (requiring Vessel Activity Report setting forth information on loads versus empties and transshipped containers). All cargo containers (full or empty) and non-containerized cargo benefit from the CFC-funded infrastructure projects and security services that allow carriers to move cargo containers and non-containerized cargo through the port more quickly, safely, and efficiently. See supra ¶ 22.

Complainants' Reply: There is no dispute of material fact. Any dispute or ambiguity regarding the language of the "Tariff" or its application is a legal question for the Commission. Respondents cite no support for their vague and ambiguous opinion that a cargo container itself (an inanimate object, as opposed to the parties that own, lease, use, or dray such equipment) can "benefit" from the non-specific infrastructure projects and security services.

24. The Tariff provides for the CFC to be assessed against a so-called terminal "user," defined as "a user of cargo handling services."

RESPONSE: No dispute. The Tariff requires "users" to pay the CFC. See, e.g., Complainants' Ex. 10 (Tariff) at Subrules 34-1220(2) and 34-1220(3). The Tariff defines "user" to mean "a user of cargo handling services." Id. at Subrule 34-1220(1)(a).

25. The Tariff nowhere defines the term "cargo handling services."

RESPONSE: No dispute. The term, "Cargo handling services," is commonly understood in the maritime shipping industry to mean services related to the loading or unloading of cargo containers and/or non-containerized cargo. Kobza Decl. ¶5.

Complainants' Reply: There is no dispute of material fact. The interpretation or application of particular undefined terms in the "Tariff," and whether they are legally ambiguous, are questions of law.

26. For the purposes of the CFC, the Port applies "user" to mean any vessel calling at any terminal, including leased terminals, at the Port.

RESPONSE: Disputed. The Port Authority does not apply "user" to mean any vessel calling at any terminal, including leased terminals. The Port Authority applies "user" as defined by the express language of the Tariff. See Complainants' Ex. 10 (Tariff) at Subrule 341220(1)(a) (defining "user" to mean "a user of cargo handling services"). At the Port Authority's private marine terminals, the only users of cargo handling services are the ocean common carriers whose cargo containers and non-containerized cargo are unloaded from or loaded onto vessels, through contract agreements with the private terminal operators. Kobza Decl. ¶6. At the Port Authority's public berths, nearly all of the users of cargo handling services are also the ocean common carriers. Id. Therefore, for purposes of the CFC, the terms "user" and "carrier" are interchangeable with respect to Complainants' cargo container operations. See generally Complainants' Ex. 10 (Tariff); see also Complainants' SOF 9146 (Complainants concede that they have "been, and continue[ ] to be, invoiced for the CFC for containers listed in its bills of lading whether carried on its own vessels or on other carriers' vessels under space charters at all Port terminal facilities").

The CFC is assessed at the time that the cargo container or non-containerized cargo is loaded onto or unloaded from a vessel at the port. With respect to cargo containers, the CFC is invoiced to the carrier that is responsible for the cargo container irrespective of whether that particular carrier's own vessel or another vessel provides the ocean transport. Zantal Decl. ¶36.

The carrier that is responsible for the particular cargo container is the carrier that has contracted and issued a bill of lading for the carriage of the cargo container, not the carrier that happens to own or operate the vessel transporting the cargo container. Id. Each carrier is individually billed for the CFC, regardless of whether the carrier's cargo containers are carried on a vessel it owns and operates or are being transported on another carrier's vessel under a

vessel sharing agreement, slot charter or other arrangement. Zantal Decl. ¶37. By placing the obligation to pay the CFC on the carrier that has taken contractual responsibility for the carriage of the goods, the CFC is assessed on the party most directly responsible for the movement of the cargo container from its point of origin, through the port, and onward to its final destination. Id.

Complainants' Reply: There is no dispute of material fact, insofar as the Port is describing its policies and its interpretation of the CFC rule, and how in practice the Port applies the CFC. The legal interpretation and application of the "Tariff" itself, and the various terms therein, are issues of law for resolution by the Commission.

27. "Terminal operator" is defined in the Tariff to be a "leased berth operator."

RESPONSE: No dispute.

28. As a result, under the Tariff as drafted, a vessel must pay the CFC to Respondent if it is a "user of cargo handling services," even if such services are provided by a party other than Respondent, i.e., a "terminal operator" (leased berth operator). Put another way, Respondent charges vessels for obtaining "cargo handling services," even though no such services are provided by Respondent.

RESPONSE: Disputed. The CFC is invoiced to the carrier that is responsible for the cargo container, not the vessel on which the container is transported, whether that particular carrier's own vessel or another vessel provides the ocean transport. See Complainants' Ex. 10 (Tariff) at Subrules 34-1220(2) and 34-1220(3); Zantal Decl. ¶36. Further, the Port Authority does not charge the CFC as a fee for obtaining "cargo handling services" from private MTOs or stevedores. The CFC is a charge to recoup and finance the Port Authority's capital investment in

the facilities, infrastructure, roadways, and intermodal transportation network projects and services, as well as the provision of security that allow carriers that use either leased or public terminal space at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently through the port after the cargo containers and/or non-containerized cargo have been unloaded from the vessels en route to their final in-land destination (or for outbound cargo containers and/or non-containerized cargo, before they are loaded onto the berthed vessels). Zantal Decl. ¶¶10, 14, 34 & Ex. 10 ("Implementation of a Land-Side Access Infrastructure and Security Fee," dated Aug. 2, 2010) (explaining that the CFC is "[d]esigned to recoup costs of ExpressRail Development program[,] . . . recoup previous non-amortized and all incremental post 9/11 costs of port related security capital and o&m costs[,] . . . [and] expand capital capacity to allow [planned roadway projects] to progress") (PA-CFC00035866-877) at 868, Ex. 19 (Port Authority's Board Meeting Minutes, dated December 7, 2010) (detailing three components of the CFC) (PA-CFC00042158-160) at 158, Ex. 15 (Port Authority Memorandum, dated February 1, 2011) (PA-CFC-00020998-005) at 998-999 (same), Ex. 7 (undated Port Authority Presentation entitled "Cargo Facility Charge") (PA-CFC00019082-090) at 084, 086089 (same), Ex. 20 (Port Authority Memorandum regarding "Maersk," dated February 1, 2011) (noting that the Port Authority "has made considerable investments to port infrastructure" and that further enhancements are necessary, which all need to be recouped) (PA-CFC00048773-786) at 781, Ex. 21 ("Chart: Revised CFC Fee- Rate Breakdown," dated June 13, 2011) (PACFC00020902-908); see also Complainants' Ex. 20 ("Port Commerce Department User Fees," dated Jan 2, 2008) (PA-CFC00020412-417) at 414; Complainants' Ex. 27 (Port Authority Internal Memo, dated Oct. 16, 2010) (noting that the CFC "would be assessed on those cargos that benefit from certain capital investments and attendant operations and maintenance costs,"

including, "non-reimbursable incremental post-9/11 expenses needed to meet federally mandated and other security measures" and "continued investment in [the Port Authority's] intermodal ExpressRail system and . . . essential roadway projects in Port Newark/Elizabeth that will provide needed roadway capacity to further reduce Port congestion") (PA-CFC-00040541-543) at 541.

Complainants' Response: There is no dispute with regard to material facts. The Port's Response clarifies the Port's view that, while the CFC is charged only to carriers that use "cargo handling services," and it is incurred at the time the "cargo handling services" are provided, the CFC is not actually charged for the "cargo handling services." Rather, the CFC is charged with the intention of covering the costs of a diverse basket of past, present and future infrastructure and security projects (which are described in the Port's Response), which are separate and apart from the "cargo handling services" that trigger the fee.

29. Whether using the services of leased terminals or berthing at public terminals, all vessels are held responsible by the Tariff for payment of the CFC, which charge is triggered by the handling by private entities of all containers and non-containerized cargoes on all carriers' vessels, including containers operated by vessel space charterers.

RESPONSE: Disputed. The CFC is invoiced to the carrier that is responsible for the cargo container, not the vessel on which the container is transported, whether that particular carrier's own vessel or another vessel provides the ocean transport. See supra ¶¶26, 28. The CFC is a charge to recoup and finance the Port Authority's capital investment in the facilities, infrastructure, roadways, and intermodal transportation network projects and services, as well as the provision of security that allow carriers that use either leased or public terminal space at the

port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. See supra ¶28. Consistent with this purpose, the CFC is triggered by the loading or unloading of cargo containers or non-containerized cargo that are will or have transited the port. See Zantal Decl. ¶49; Complainants' Ex. 10 (Tariff) at Subrule 34-1220(3)(a)(ii).

Complainants' Reply: There is no dispute of material fact, insofar as the Port is describing its interpretation of the CFC rule, and the policies and practices it has adopted to implement it. See supra ¶ 28.

30. The Port scheme is facially that the lessee terminal operator is required by the Tariff to collect the CFC from each container vessel operator and to forward the payments to the Port.

RESPONSE: Disputed. Lessee MTOs do not collect the CFC from each container vessel operator. See Zantal Decl. ¶¶48-50 & Ex. 22 (Port Authority Memorandum, dated May 4, 2011) (describing the process by which the PA gathers the data used to determine the amount of the CFC incurred by each carrier) (PA-CFC00020511-515) at 511; see also Complainants' Ex. 10 (Tariff) at Subrule 34-1220(3)(a)(ii); Complainants' SOFT 46 (conceding that the carrier - and not the vessel - is individually billed for each container the carrier transports). The MTO is required to collect the CFC from each ocean common carrier incurring the charge and to forward the payments to the Port Authority. See Complainants' Ex. 10 (Tariff) at Subrule 341220(2) (providing that "[a]t all leased berths, each user is responsible for payment of the Cargo Facility Charge to the Port Authority, which will be collected by the terminal operator handling the user's cargo for remittance to the Port Authority") (emphasis added).

Complainants' Response: While the Port seeks to suggest a dispute over the use of the terms "vessel operator" and "common carrier," any distinction is immaterial, as there is no actual factual dispute as to how the CFC is collected by the Port from Complainants. In general, the Commission uses the terms "vessel operating common carrier" and "ocean common carrier" interchangeably, e.g., http://www.fmc.gov/resources/vessel_operating_common_carriers.aspx.

31. In practice, some carriers remit the CFC funds to the Port directly.

RESPONSE: Not disputed.

32. Terminal operators must send a monthly Vessel Activity Report ("Report") to the Port Authority detailing all vessel activity at their terminals. The Report must identify vessels from which the terminal operator did not receive the CFC charges stated in the Port Authority invoices submitted to the terminal operator.

RESPONSE: Disputed. The CFC is invoiced to the carrier that is responsible for the cargo container irrespective of whether that particular carrier's own vessel or another vessel provides the ocean transport. See supra ¶26. The required Reports pertain to users, not vessels. See Complainants' Ex. 10 (Tariff) at Subrule 34-1220(3)(b)(ii) (explaining that MTOs must send a monthly Vessel Activity Report to the Port Authority detailing each user's loading and unloading activities at their terminals and the MTO must also identify users that did not pay their CFC charges stated in the invoices submitted to the MTO).

Complainants' Response: While the Port seeks to suggest a dispute over the use of the terms "vessel" and "carrier", the distinction is immaterial, and does not appear to be any actual

factual dispute as to the Port's current policies or practices for requiring Vessel Activity Reports and collecting the CFC from complainants. See supra ¶ 30.

33. For their vessels' use of a public (non-leased) berth, the Tariff directs Complainants to pay the CFC directly to the Port.

RESPONSE: Disputed. Complainants' statement that the CFC compensates the Port Authority for a vessel's use of a public berth is false. The CFC is a charge to recoup and finance the Port Authority's capital investment in the facilities, infrastructure, roadways, and intermodal transportation network projects and services, as well as the provision of security that allow carriers that use either leased or public terminal space at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. See supra ¶¶28-29. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects and services. See supra ¶¶3-5, 7-9.

Complainants' Reply: There is no actual dispute of material fact. Complainant's statement did not address or allege what the CFC was for; rather, it simply stated to whom the payment is to be sent when vessels call at a public berth.

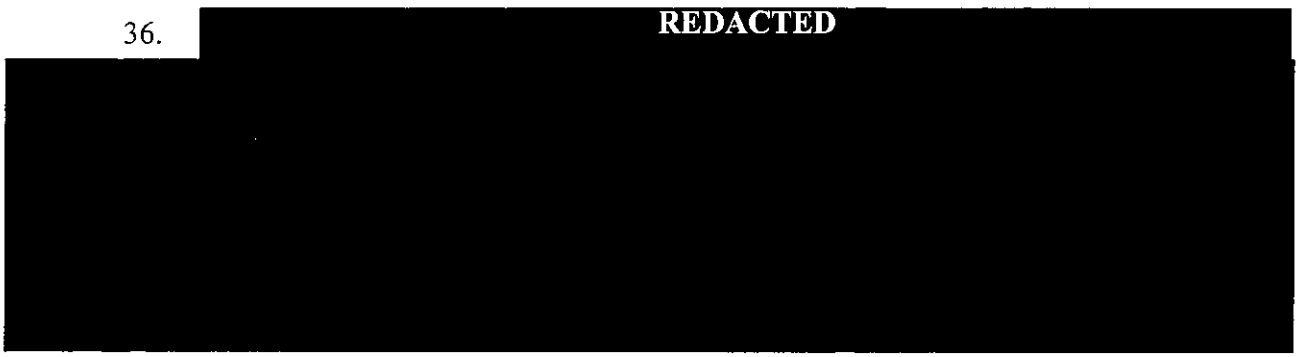
34. The Port issues monthly invoices to each "user" of a leased terminal and to each "user" of a public berth.

RESPONSE: No dispute.

35. Invoices to "users" of leased terminals are issued "do" the terminal based on the prior month's terminal Report.

RESPONSE: No dispute.

36. REDACTED



RESPONSE: No dispute.

37. If a "user" does not pay the CFC charges for two consecutive Report periods, Section H directs the Port to require all terminal operators to cease service to all vessels whose operator did not pay the CFC charge and provides that the Port will issue a port-wide blockade order:

> ...the Port Authority shall issue a directive to every terminal operator prohibiting them from providing any service that would be subject to a Cargo Facility Charge to the delinquent user for a period from no later than 5 calendar days from the date of the directive until receipt of notice from the Port Authority that such unpaid Cargo Facility Charges have been paid.

RESPONSE: Disputed to the extent that Complainants' statement offers a legal interpretation of the Tariff, Section H, and also because Complainants have improperly substituted "vessel" for "user" in describing the Tariff. See generally Complainants' Ex. 10 (Tariff) at Section H (distinguishing between "users" and "vessels"). See supra ¶¶28-29. The CFC is invoiced to the carrier that is responsible for the cargo container, not the vessel on which

the container is transported, whether that particular carrier's own vessel or another vessel provides the ocean transport. See supra ¶¶26, 28.

If a carrier does not pay the invoiced CFC charges for two consecutive reporting periods (a "non-compliant carrier"), the Port Authority's practice is to contact both the non-compliant carrier and each private terminal operator to remind them of the outstanding balance. If the balance remains unpaid, the Tariff authorizes the Port Authority to issue a directive requiring all terminal operators either to cease service to the non-compliant carrier or to take financial responsibility itself for payment of that carrier's CFC charges. See Complainants' Ex. 10 (Tariff) at Subrule 34-1220, 3(b)(iii)-(iv). Thus, a non-compliant carrier's cargo containers may still be moved through the port where a terminal operator accepts financial responsibility for paying the CFC on the non-compliant carrier's behalf. Zantal Decl. ¶38.

Additionally, only a non-compliant carrier, but not a vessel, risks being unable to move its cargo containers through the port by failing to pay the CFC. Zantal Decl. 39. For example, a vessel owned by a non-compliant carrier is permitted in the port to load and unload the containers of any compliant carrier that are being transported on the vessel. Id. Likewise, a vessel owned by a compliant carrier that is that is transporting of both compliant and noncompliant carriers is also permitted in the port and can discharge and load the containers of any compliant carrier. Id. But in any of these circumstances, the vessel itself is allowed to berth at the port. Id.

Complainants' Reply: There is no dispute of material fact. Complainants do not dispute that the Port is describing its interpretation of the CFC rule, and the policies and practices it has adopted to implement it.

38. The CFC applies to all space charterers on container vessels.

RESPONSE: Disputed to the extent that Complainants' statement offers a legal interpretation of the Tariff, Section H. For clarity, the Tariff requires "users" to pay the CFC. The Tariff defines "user" to mean "a user of cargo handling services." See supra ¶¶26, 29. The charge is invoiced to the carrier that is responsible for the cargo container irrespective of whether that particular carrier's own vessel or another vessel provides the ocean transport. See supra ¶26. Subrule 34-1200 of the Tariff provides that the CFC applies to "all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port leased and public berths." See Complainants' Ex. 10 (Tariff) at Subrule 34-1200.

Complainants' Reply: There is no dispute of material fact. Complainants do not dispute that the Port is describing its interpretation of the CFC rule, and the policies and practices it has adopted to implement it.

39. A directive by the Port to deny service to a delinquent carrier effectively blockades not only that operator's vessels and appurtenant containers, but, as well, all the containers to be carried on the delinquent operator's vessels under space charters, and all the delinquent operator's containers in slots chartered on other operator's vessels.

RESPONSE: Disputed. Complainants' statement offers an incorrect legal interpretation of the Tariff and is inconsistent with the language, application, and enforcement of the Tariff. See supra ¶37. Only a non-compliant carrier, but not a vessel, risks being unable to move its cargo containers through the port by failing to pay the CFC. See id. A directive by the Port Authority to prohibit a non-compliant carrier from loading or unloading its cargo containers at the port does not "blockade" or "bar" that carrier's vessel from berthing at the port to load and

unload the cargo containers of any compliant carriers that are being transported on the vessel. See id. Likewise, a vessel owned by a compliant carrier that is carrying cargo containers of a non-compliant carrier and compliant carriers is also permitted in the port and, can discharge and load the containers of any compliant carriers. See id. Furthermore, even a non-compliant carrier can load or unload its cargo containers so long as the MTO accepts responsibility for paying the CFC fees incurred by the non-compliant carrier. See id.

Complainants' Reply: There is no dispute of material fact. Complainants do not dispute that the Port is describing its interpretation of the CFC rule, and the policies and practices it has adopted to implement it.

40. If one Complainant signatory to a vessel-sharing agreement were ordered barred by the Port from all Port terminals, other Complainant signatories would be punished. All containers on that Complainant's vessel would be barred, including containers belonging to other Complainants and carried under a space charter or vessel-sharing arrangement.

RESPONSE: Disputed. Complainants' statement offers an incorrect legal interpretation of the Tariff and is inconsistent with the language, application, and enforcement of the Tariff. If one signatory to a vessel-sharing agreement failed to pay the CFC, other signatories to the vessel-sharing agreement would not be precluded from having their cargo containers loaded and/or unloaded at the port. See supra ¶¶37, 39. The signatories to the vessel sharing agreement, slot charter, or other cooperative arrangement can still have their cargo containers loaded and unloaded at the port even if transported on a vessel operated by a non-compliant user. See id. Only the carrier that failed to pay the CFC would be precluded from having its cargo containers loaded or unloaded at the port, whether carried on a vessel owned by the non-compliant carrier

or another carrier's vessel, unless an MTO agreed to pay the CFC charges incurred by the non-compliant carrier. See id.

Complainants' Reply: There is no dispute of material fact. Complainants do not dispute that the Port is describing its interpretation of the CFC rule, and the policies and practices it has adopted to implement it.

41. If a terminal operator continues serving a vessel despite a prohibition of service ordered by the Port, that terminal operator purportedly becomes fully liable to the Port indefinitely for the CFC charges assessed against that vessel, according to the Tariff.

RESPONSE: Disputed. The CFC is invoiced to the carrier that is responsible for the cargo container, not the vessel on which the container is transported, whether that particular carrier's own vessel or another vessel provides the ocean transport. See supra ¶¶26, 28, 37, 3940. If an MTO continues serving a non-compliant carrier despite a prohibition of service, that "terminal operator shall become liable for, and shall be obligating itself to pay to the Port Authority the full amount of the Cargo Facility Charges . . . incurred by such user on and after the date of the violation." See Complainants' Ex. 10 (Tariff) at Subrule 34-1220(3)(b)(iv).

Complainants' Reply: There is no dispute of material fact. Complainants do not dispute that the Port is describing its interpretation of the CFC rule, and the policies and practices it has adopted to implement it.

42. The threat of berth denial forces Complainants to pay the CFC on both roll-on/roll-out vessel operations and on container vessels/container operations, including those of space charterers.

RESPONSE: Disputed. A vessel owned by (or carrying cargo containers for) a non-compliant carrier is still permitted to berth in the port. The cargo containers of all carriers that have paid the CFC may still be loaded and unloaded at the port even if transported on a vessel of a non-compliant user. Only the non-compliant carrier's cargo containers (whether carried on a vessel owned by the non-compliant carrier or another carrier's vessel) may not be loaded or unloaded at the port, unless, of course, the MTO handling the non-compliant user's cargo containers agrees to pay the non-compliant user's CFC-charges. See supra ¶¶37, 39-42.

Complainants' Reply: There is no dispute of material facts. Complainants do not dispute the Port's newly stated position as to what services would be denied at berth, and its current intentions regarding cargo carried pursuant to space charters. In any event, these distinctions are not material; Complainants are forced to pay the CFC due to the coercive threat that service will be denied at the berth, precluding movement of cargo and disrupting operations.

43. Under Subrule 34-1210(5), transshipped containers are subject to the CFC (for one move, not two). "Transshipped containers" mean containers that are discharged from a vessel, placed on the terminal and loaded onto another vessel for further carriage as part of a single voyage; they do not exit the terminal.

RESPONSE: No material factual dispute. Subrule 34-1220(5) of the Tariff – not Subrule 34-1210(5) - provides that transshipped containers are subject to the CFC for one move, not two. See Complainants' Ex. 10 (Tariff) at Subrule 34-1220(5). Transshipped containers represent a de minimis amount of the total volume of cargo containers that pass through the port. Zantal Decl. ¶45. For example, in 2012, out of more than three million total cargo containers passing through the port, fewer than 650 containers were transshipped (i.e., 0.02%). Id.

Collection of CFC from Complainants

44. Each of the Complainant's vessels regularly call at a lessee's terminal and each Complainant has loaded and discharged, and continues to load and discharge, cargo at the respective terminal.

RESPONSE: No dispute.

45. According to the process described by the Tariff, since March 14, 2011, each Complainant has been, and continues to be, invoiced by the Port do the container terminal operator for the CFC.

RESPONSE: No dispute.

46. Each Complainant has been, and continues to be, invoiced for the CFC for cargo containers (or non-containerized cargo) listed in its bills of lading whether carried on its own vessels or on other carriers' vessels under space charters at all Port terminal facilities.

RESPONSE: No material factual dispute.

47. Each Complainant is forced by the blockade threat to then pay the CFC to the Port via the leased terminal.

RESPONSE: Disputed. The CFC is not enforced by threat of any blockade. A directive by the Port Authority to prohibit a non-compliant carrier from loading or unloading its cargo containers at the port does not "blockade" or "bar" that carrier's container vessel from berthing at the port. Nor does such a directive bar from the port other vessels that are carrying cargo containers for the non-compliant carrier. The cargo containers of all carriers that have paid the

CFC can still be loaded and unloaded at the port even if transported on a vessel of a noncompliant user. Furthermore, even a non-compliant carrier can load or unload its cargo containers so long as the MTO accepts responsibility for paying the CFC fees incurred by the non-compliant carrier. See supra ¶¶37, 39-42.

Complainants' Reply: There is no dispute of material facts. Complainants do not dispute the Port's newly stated position as to what services would be denied at berth, and its current intentions regarding cargo carried pursuant to space charters. In any event, these distinctions are not material; Complainants are forced to pay the CFC due to the coercive threat that service will be denied service at the berth, precluding movement of cargo and disrupting operations. See supra ¶42.

Threats to Blockade Complainants from Port

48. The Port would deny, and the Port has threatened to deny, any Complainant's vessels access to berths at the Port, leased and public, where that Complainant has not paid the CFC according to the Port's demands. The Port announced enforcement for lack of compliance with the CFC and its supporting rules in Section II, beginning August 15, 2011.

RESPONSE: Disputed as to the first sentence of Complainants' SOF ¶48. The Port Authority does not deny, and has not threatened to deny, any Complainants' vessels access to leased berths at the port, irrespective of whether that Complainant has or has not paid the CFC.

A directive by the Port Authority to prohibit a non-compliant carrier from loading or unloading its cargo containers at the port does not "blockade" or "bar" that carrier's container vessel from berthing at the leased terminals. Nor does such a directive bar from the port other vessels that are carrying cargo containers for the non-compliant carrier. The cargo containers of all carriers that have paid the CFC can still be loaded and unloaded at the port's leased and

public berths even if transported on a vessel of a non-compliant carrier. Furthermore, even a non-compliant carrier can load or unload its cargo so long as the private MTO accepts responsibility for paying the CFC fees incurred by the non-compliant carrier. See supra ¶¶37, 39-42, 47. No dispute as to the second sentence.

Complainants' Reply: There is no dispute of material facts. Complainants do not dispute the Port's newly stated position as to what services would be denied at berth, and its current intentions regarding cargo carried pursuant to space charters. In any event, these distinctions are not material; Complainants are forced to pay the CFC due to the coercive threat that service will be denied service at the berth, precluding movement of cargo and disrupting operations. See supra ¶¶42, 47.

49. On July 12, 2011, Brian Kobza, Industry Relations - Ocean Carrier, Auto, Rail and Labor at the Port Authority of New York and New Jersey, sent an e-mail to 57 ocean carrier representatives, including Complainants, transmitting a copy of an undated notice from Dennis Lombardi, Deputy Director, Port Commerce Department, to each Leased Berth Terminal Owner.

RESPONSE: No dispute.

50. The notice from Mr. Lombardi, transmitted to the carriers by Mr. Kobza, stated that the first enforcement action for uncollected Cargo Facility Charge amounts will be taken on August 15, 2011.

RESPONSE: No dispute.

51. The notice further stated:

Within 30 days after the date of each invoice, the lease berth operator must remit the amount collected from each user and/or make a report of each user who failed to pay the Cargo Facility Charge during the relevant Vessel Activity Reporting period. In the event of a failure by a user to pay Cargo Facility Charges for two consecutive Vessel Activity Reporting periods, the Port Authority will issue a directive to all leased berth operators prohibiting them from providing any service that incurs a Cargo Facility Charge to the delinquent user. Should a Terminal Operator provide service to a user in violation of the directive, such Terminal Operator shall be liable for, and shall pay to, the Port Authority the full amount of the Cargo Facility Charges resulting from services performed by that Terminal Operator for the affected user on or after the date of the violation of the directive.

RESPONSE: No dispute.

52. REDACTED

RESPONSE: REDACTED

The vessel of a non-compliant carrier can still berth at the leased terminal to load and unload onto the vessel the cargo of any compliant users. See supra ¶¶37, 39-42, 47-48. Furthermore, even a non-compliant carrier can load or unload its cargo

so long as the private MTO accepts responsibility for paying the CFC fees incurred by the non-compliant carrier. See supra ¶¶37, 39-42, 47.

Complainants' Reply: REDACTED [redacted] See supra ¶¶42, 47.

53. REDACTED [redacted]

RESPONSE: REDACTED [redacted] The vessel of a non-compliant carrier can still berth at the leased terminal to load and unload onto the vessel the cargo of any

compliant users. See supra ¶52. Furthermore, even a non-compliant carrier can load or unload its cargo so long as the private MTO accepts responsibility for paying the CFC fees incurred by the non-compliant carrier. See id.

Complainants' Reply: REDACTED

54. REDACTED

RESPONSE: REDACTED The vessel of a non-compliant carrier can still berth at the

leased terminal to load and unload onto the vessel the cargo of any compliant users. See supra ¶52. Furthermore, even a non-compliant carrier can load or unload its cargo so long as the private MTO accepts responsibility for paying the CFC fees incurred by the non-compliant carrier. See id.

Complainants' Reply: REDACTED

[redacted]

Inapplicability of Respondent's Tariff to Private MTO facilities

55. The lessee MTOs that serve Complainants' container vessels assess charges in accordance with their published tariffs, or in accordance with rates specified in individual contracts with Complainants. The Complainants' vessels pay fees and charges to the lessee MTOs for actual services performed at their leased container facilities, pursuant to their tariffs or Complainants' contracts with them.

RESPONSE: Disputed to the extent Complainants are implying that the only services and/or benefits they receive in, about, and at the leased marine terminals are those provided by private MTOs. Private MTOs charge for loading, unloading and stevedoring services in accordance with their published tariffs or in accordance with rates specified in individual contracts with Complainants. The Port Authority provides different services and benefits which are separate and distinct from the services provided by private MTOs. The services and benefits provided by the Port Authority include the provision and maintenance of facilities, infrastructure,

roadways and intermodal transportation, as well as security that allow Complainants and other carriers to move cargo containers and non-containerized cargo through the port more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶ 3-5, 7-8.

Complainants' Reply: See supra ¶¶ 3-5, 7-8.

56. The CFC is a surcharge by the Respondent against each Complainant for using services at the private MTO facilities. The vessels, therefore, are subjected to additional (and duplicative) charges for their use of private MTO services.

RESPONSE: Disputed. The CFC is invoiced to the carrier that is responsible for the cargo container, not the vessel on which the container is transported, whether that particular carrier's own vessel or another vessel provides the ocean transport. See supra ¶¶26, 28, 37, 39, 40. Furthermore, the CFC is not duplicative of the fees private MTOs charge for their services. The Port Authority provides services and benefits which are separate and distinct from the services provided by private MTOs. The services and benefits provided by the Port Authority include the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network projects and services, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. See supra ¶¶3-5, 7-8. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶3-5, 7-8, 55.

Complainants' Reply: There is no dispute of material fact. Complainants have not asserted that the Port does not provide "facilities, infrastructure, roadways and intermodal transportation network, as well as security." See supra ¶¶ 3-8.

57. The Port's Tariff refers to "user" or "Port User" throughout the Tariff, approximately twenty-four (24) times, in reference to use of Port facilities; however, the Tariff provides, for the first time, a definition of "Port User" in Section H, the CFC section, 'User' shall mean a user of cargo handling services."

RESPONSE: No material factual dispute. The word "user" appears throughout the Tariff. See generally Complainants' Ex. 10 (Tariff). For purposes of the CFC, the Tariff defines "user" to mean "a user of cargo handling services." See Complainants' Ex. 10 (Tariff) at Subrule 34-1220(1)(a).

58. Before the adoption of the CFC in Section H, Respondent's Tariff never before defined "user" to encompass parties not using the Port's services.

RESPONSE: Disputed because Complainants falsely state that the Tariff defines "user" to encompass parties not using or being benefited by the Port Authority's provision of facilities, infrastructure, intermodal transportation, and security services and projects. All users subject to the CFC, i.e., the carriers, including Complainants, are benefitted by the expenditures it funds. See supra ¶¶3-5, 7-9, 28-29. Complainants concede that they benefit from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶3-5, 7-8, 55-56.

Complainants' Reply: The language of the "Tariff" speaks for itself; to the extent there are issues of "Tariff" interpretation, definition and application, these are issues of law rather than disputed facts.

59. While the lessee MTOs' dealings with Respondent are controlled by the terms and conditions extant in their MTO lease Tariff, Section H, Subrule 34-1220s with the Port, the private MTOs terminals are expressly exempt from the Respondent's Tariff rules and regulations.

RESPONSE: Disputed. Private MTOs terminals are not at all exempt from the Respondent's Tariff rules and regulations. On the contrary, the leases issued by the Port Authority to the relevant MTOs include a provision expressly requiring the lessee to observe the Port Authority's Rules and Regulations at the leased premises. See supra ¶15. The Tariff is thus fully applicable at the leased premises where the carriers' cargo containers are loaded and unloaded. See Complainants' Ex. 10 (Tariff) at Subrule 34-090 (explaining that the Tariff applies at leased terminals so long as "provision is made in the lease for application of said Rules and Regulations for leased premises").

Complainants' Reply: There is no dispute of material facts. The relevant "Tariff" and agreement provisions speak for themselves. To the extent there is a dispute regarding the application of particular "Tariff" terms, the issue is a legal one for consideration by the commission, rather than a factual dispute.

60. Tariff Subrule 34-090 states:

> Any permission granted by the Port Authority directly or indirectly, expressly or by implication, to any person or persons to enter upon or use a terminal or any part thereof (including) watercraft operators, crew members and passengers,

> spectators, sightseers, pleasure and commercial vehicles, officers and employees of lessees and other persons occupying space at such terminal, persons doing business with the Port Authority, its lessees, sublessees and permitees, and all other persons whatsoever whether or not of the type indicated, is conditioned upon compliance with the Port Authority Rules and Regulations; and entry upon or into a terminal by any person shall be deemed to constitute an agreement by such person to comply with said Rules and Regulations; provided, however, that unless provision is made in the lease for application of said Rules and Regulations to the leased premises, such Rules and Regulations shall not apply to such leased premises. (Emphasis supplied.)

RESPONSE: No dispute.

61. Complainant's private terminal operators in the port have not made provision in their leases for the Port's Tariff Rules and Regulations to apply. See FMC Agreement No. 201131 PANYNJ/Maher Lease, http://www2.fmc.gov/agreements/mtos_npage.aspx.

RESPONSE: Disputed. The lease cited as support for this statement (FMC Agreement No. 201131 available at http://www2.fmc.gov/agreements/mtos_npage.aspx), contains a provision expressly requiring lessee Maher to observe the Port Authority's Rules and Regulations at the leased premises. Zantal Decl. ¶9 & Ex. 2 (Maher Lease EP-249, dated Oct. 1, 2000, available at http://www.panynj.gov/corporate-information/pdf/port-lease-maher-terminals.pdf) ¶12(a). Indeed, the leases issued by the Port Authority each contain a provision expressly requiring the lessee to observe the Port Authority's Rules and Regulations at the leased premises where private MTOs provide loading and unloading services. See supra ¶15; see also Complainants' Ex. 10 (Tariff) at Subrule 34-090 (explaining that the Tariff applies at leased terminals so long as "provision is made in the lease for application of said Rules and Regulations for leased premises"). The Tariff is thus fully applicable at the leased premises where the carriers' cargo containers are loaded and unloaded. See supra ¶59.

Complainants' Reply: There is no dispute of material facts. The relevant "Tariff" and agreement provisions speak for themselves. To the extent there is a dispute regarding the application of particular "Tariff" terms, the issue is a legal one for consideration by the commission, rather than a factual dispute.

62. REDACTED

RESPONSE: No dispute as to the fact that the Port Authority produced the referenced letter. See Complainants' Ex. 19 (PA-CFC00047458-459) at 458. Disputed as to the characterization of the contents of this letter and the merit of APM's purported position regarding the enforcement of the CFC. Zantal Decl. ¶9 & Ex. 23 (APM Terminals Lease No. EP-248, dated Jan. 6, 2000) (PA-CFC00049668-798) ¶12(a). In terms of relevance, none of the Complainants has an agreement for the use of APM's terminals. See Complainants' Ex. 7 (Stevedoring and Terminal Services Agreement between COSCO Container Lines Co., Ltd., Kawasaki Kisen Kaisha, Ltd., Yang Ming Marine Transport Corp., Hanj in Shipping Co., Ltd., and United Arab Shipping Company and Maher); Complainants' Ex. 8 (NYK agreements with Global Terminal, NYCT, and PNCT). Pursuant to the leases issued by the Port Authority, the Tariff is fully applicable both at APM Terminal and the leased premises where the Complainants load and unload cargo containers. See supra ¶61.

Complainants' Reply: There is no dispute of material facts. To the extent there is a dispute regarding the application of particular "Tariff" terms, the issue is a legal one for

consideration by the Commission, rather than a factual dispute. Complainants object to the Port's argument regarding relevance.

Background and Adoption of the CFC

63. REDACTED

RESPONSE: REDACTED

64. REDACTED

RESPONSE: REDACTED

[redacted]

Complainants' Reply: There is no dispute of material facts; the text of the letter speaks for itself.

65. REDACTED [redacted]

RESPONSE: REDACTED [redacted]

Complainants' Reply: There is no dispute of material facts; the text of the letter speaks for itself.

66 REDACTED [redacted]

[redacted]

RESPONSE: REDACTED [redacted]

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself.

67. REDACTED [redacted]

RESPONSE: No dispute.

68. This marketing plan was finalized (undated) with supporting data.

RESPONSE: Disputed to the extent that Complainants assert that PA-CFC00011063 had been "finalized." The document provides no indication on its face that the analysis undertaken therein was complete or final, but, on the contrary, was clearly a draft. The document contains bracketed headers and footers throughout, and also as Complainants note, it was undated. See generally Complainants' Ex. 25 (PA-CFC00011063).

Complainants' Reply: There is no dispute of material facts.

69. REDACTED

RESPONSE: REDACTED

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself.

70. REDACTED

RESPONSE: REDACTED

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself. Complainants do not dispute that the rate has not changed.

71. REDACTED

RESPONSE: REDACTED

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself.

72. REDACTED

RESPONSE: REDACTED

[redacted]

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself. REDACTED [redacted]

73. REDACTED [redacted]

RESPONSE: REDACTED [redacted]

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself.

74. REDACTED [redacted]

RESPONSE: REDACTED

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself.

75. REDACTED

RESPONSE: REDACTED Because containers, on average, are 1.7 TEUs and the CFC is $4.95 per TEU, the average cost of the CFC per container is $8.42. Flyer/Shampine Supp. Decl., Appendix C (Compass Lexecon Report) (PA-CFC00000001-052) at 003 note 5; see also Complainants' Ex. 10 (Tariff) at 34-036 (explaining that "Common dimensions are 20'X8'X8' (called a TEU or twenty-foot equivalent unit used as a universal measurement for container volumes) or 40'X8'X8'"). The Port Authority has not increased the CFC's rate since the fee's implementation. Zantal Decl. ¶40.

Complainants' Reply: No dispute.

76. REDACTED

RESPONSE: REDACTED

77. REDACTED

RESPONSE: REDACTED

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself. REDACTED

78. REDACTED

RESPONSE: REDACTED

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself. REDACTED

79. REDACTED

RESPONSE: REDACTED

[redacted]

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself.

80. REDACTED [redacted]

RESPONSE: No dispute.

81. REDACTED [redacted]

RESPONSE: REDACTED [redacted]

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself. REDACTED [redacted]

82. New Jersey Senator Joseph Pennacchio has introduced a bill requiring a CFC-like charge levied on cargo only.

RESPONSE: Disputed to the extent that Complainants' statement offers a legal interpretation of the proposed Senate Bill No. 2325, State of New Jersey 215th Legislature. The proposed state law Senate Bill No. 2325, which has not been enacted, does not specify the benefits or services the proposed fee would recover and has no relevance here whatsoever. Further disputed as to Complainants' characterization of the bill as "CFC-like."

Complainants' Reply: There is no dispute of material facts; the text of the proposed legislation speaks for itself.

83. REDACTED

RESPONSE: REDACTED

84. REDACTED

RESPONSE: REDACTED [redacted] These observations, together with other analyses of a potential system for the Port Authority to charge BCOs directly, led the Port Authority to conclude that such a system was neither practicable at this time nor cost-effective. See Zantal Decl. ¶50 & Ex. 22 (concluding that establishing a PierPASS system at the port would require "substantial investment including an information management system, a customized web interface, revenue collection/accounting systems and a sophisticated Electronic Data Interchange (EDI) with terminals and ocean carriers," and estimating that a full PierPASS rollout could take a minimum of two years) (PA-CFC00020511-515) at 513.

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself.

85. REDACTED [redacted]

RESPONSE: No factual dispute. REDACTED

[redacted]

Complainants' Reply: REDACTED

[redacted]

86. REDACTED

[redacted]

RESPONSE: No factual dispute. See supra ¶85.

87. REDACTED

[redacted]

RESPONSE: No dispute.

88. REDACTED

RESPONSE: REDACTED

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself.

89. REDACTED

RESPONSE: REDACTED

Complainants' Reply: There is no dispute of material facts; the text of the document speaks for itself. REDACTED

90. The Port adopted the CFC in 2010 as a so-called "cargo-based" charge to be imposed on Complainants and other carriers. The Port supported its adoption, stating the goal of the CFC assessment on "cargoes," not vessels.

RESPONSE: Disputed to the extent that Complainants' statement that the Port Authority adopted the CFC as a "so-called 'cargo based' charge" suggests that the CFC is a charge on vessels as opposed to cargo containers and/or non-containerized cargo. The Port Authority distinguishes between "users" and "vessels" with respect to the applicability and enforcement of the CFC. See supra ¶8; see also Complainants' Ex. 10 (Tariff) at Subrule 34-1220(3)(a)(ii) (explaining that MTOs are responsible for reporting, on a monthly basis, the "volume of cargo discharged from and/or loaded onto each vessel for each user" - not by vessel) (emphasis added).

Complainants' Reply: There is no dispute of material fact. To the extent there is a dispute regarding the interpretation or application of the "Tariff" terms, it is a legal dispute for the Commission, not a factual dispute. The documents produced by the Port speak for themselves. The minutes of the Port board attached at Exhibit 19 to the Zantal declaration state in relevant part:

> RESOLVED, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to - (1) amend the Marine Terminal Tariff Federal Maritime Commission Schedule No. PA-10 Tariff (Tariff) to establish a new Port Authority cargo-based port infrastructure and security fee, to be known as the Cargo Facility Charge, that will be applicable to waterborne cargo discharged from or loaded on to vessels at Port Authority leased and public berths, with the timing of the implementation of the Cargo Facility Charge to be determined by the Executive Director and the Chairman, consistent with the By-Laws.

(Emphasis added).

91. More recently, the Port confirmed that carrier CFC payments are not earmarked for particular expenditures. In a document request for "all documents sufficient to show Respondent's expenditures of CFC receipts," Respondents objected that "because CFC receipts are not earmarked for particular expenditures . . . the requested documents do not exist."

RESPONSE: Disputed. Complainants' only basis for disputing the fact that the CFC pays for infrastructure, intermodal transportation, and security appears to be a written objection that the Port Authority made in response to one of Complainants' document requests. See Mot. for Judgment at 7-8. The Port Authority did indeed note that incoming CFC payments are not "earmarked" to be used on later particular expenditures, but that is because the CFC primarily recoups costs of projects that have already been paid for. Further disputed to the extent Complainants misconstrue the basis and purpose of the objection, which was to clarify that the type of information sought in the documents requested does not exist as described because the projects funded by the CFC are already complete or on-going. Documents produced by the Port Authority in response to Complainants' requests show the Port Authority's infrastructure and security investments in detail, as well as a breakdown of how the CFC is allocated to recover for the roadway, intermodal, and security improvements. See Zantal Decl. ¶¶10-18.

Complainants' Reply: Complainant claims a dispute of fact where none exists. The Port's interrogatory response setting out the explanation why the Port could not produce the requested records speaks for itself. Complainants have not contested the Port's assertion that, when it adopted the CFC, its alleged purpose was to recover costs and or raise capital for projects in categories including roadway, intermodal, and security. The Port and Complainants appear to be in accord that CFC receipts are not earmarked to a specific or particular project; rather, the documents produced by the Port indicate that the fee receipts were meant to recover or raise

capital for a variety of projects in the area of "roadway, intermodal, and security improvements". See Zantal Decl. ¶¶10-18. Exhibit 15 to the Declaration of Peter Zantal. Objection to the characterization of the cited documents as a "breakdown of how the CFC is allocated," to the extent the documents produced by the Port do not specifically allocate what percentage (or dollar amount) of the per-TEU CFC fee is allocable to any particular project (e.g., McLester Street, ExpressRail, etc.)

II. COMPLAINANT'S REPLY TO PORT AUTHORITY'S STATEMENT OF ADDITIONAL MATERIAL FACTS

Organization and Use of Facilities at the Port

92. The Port Authority is a massive and highly diversified transportation enterprise that includes an airport system, marine terminals and ports, the PATH rail transit system connecting New Jersey and New York City, six tunnels and bridges between New York and New Jersey, and the Port Authority Bus Terminal in Manhattan. Zantal Decl. ¶5.

Complainants' Response: No dispute.

93. The Port Authority manages Port Newark, the Elizabeth-Port Authority Marine Terminal, the Howland Hook Marine Terminal, the Brooklyn-Port Authority Marine Terminal, the RHCT, and the Port Jersey Port Authority Marine Terminal. Combined, these facilities make up the marine terminal facilities of the Port of New York and New Jersey. Zantal Decl. ¶6; see also Complainants' Ex. 6 (http://www.panynj.gov/port/about-port.html).

Complainants' Response: No dispute.

94. Complainants Hanjin, "K" Line, UASC, and Yang Ming's container vessels call exclusively at private marine terminals operated by Maher. See Complainants' Ex. 7 (Stevedoring and Terminal Services Agreement between COSCO Container Lines Co., Ltd., Kawasaki Kisen Kaisha, Ltd., Yang Ming Marine Transport Corp., Hanjin Shipping Co., Ltd., and United Arab Shipping Company and Maher).

Complainants' Response: No dispute.

95. Complainant Nippon Yusen Kaisha's ("NYK") container vessels call at private marine terminals operated by Global Terminal, NYCT and PNCT. See Complainants' Ex. 8 (NYK agreements with Global Terminal, NYCT, and PNCT).

Complainants' Response: No dispute.

96. The Port Authority has entered into leases with all of the private terminal operators ("MTOs") that manage the daily loading and unloading of Complainants' container ships (e.g., Global Terminals, Maher, NYCT, and PNCT). Zantal Decl. ¶9; see also Complainants' Ex. 7 (Stevedoring and Terminal Services Agreement between COSCO Container Lines Co., Ltd., Kawasaki Kisen Kaisha, Ltd., Yang Ming Marine Transport Corp., Hanjin Shipping Co., Ltd., and United Arab Shipping Company and Maher); Complainants' Ex. 8 (NYK agreements with Global Terminal, NYCT, and PNCT).

Complainants' Response: No dispute. Complainants clarify that the MTOs role goes beyond managing loading and unloading of ships. MTOs lease the facilities in which they operate, and thus provide the berths and marine terminal facilities at which the ships dock and

into which the containers and cargo are handled and stored, and other services, as set forth in the cited contracts at Complainants' Ex. 7 and 8.

97. The lease issued by the Port Authority to Global Terminal provides that "Lessee "agrees to observe and obey (and to compel . . . others on the Premises with its consent, to observe and obey) the rules and regulations of the Port Authority" promulgated for, among other things, "the reimbursement of the Port Authority of capital or operating costs incurred or anticipated in connection with improvements benefiting users of the Port Authority facilities." Zantal Decl. ¶9 & Ex. 1 (Global Terminal Lease No. LPJ-001, dated June 23, 2010, available at littp://www.panynj.govicorporate-information/pdf/port-lease-global.pdf) ¶16(a).

Complainants' Response: No dispute.

98. The lease issued by the Port Authority to Maher Terminals provides that Lessee "agrees to observe and obey (and to compel . . . others on the premises with its consent to observe and obey) the Rules and Regulations of the Port Authority . . . promulgated by the Port Authority for reasons of safety, health, or preservation of property, or for the maintenance of the good and orderly appearance of the premises, or for the safe or efficient operation of the Facility." Zantal Decl. ¶9 & Ex. 2 (Maher Terminals Lease No. EP-249, dated Oct. 1, 2000, available at http://www.panynj.gov/corporate-information/pdf/port-lease-maher-terminals.pdf) ¶12(a).

Complainants' Response: No dispute. As the Port's statement suggests, the Maher Terminal lease does not include the clause in the Global Terminal lease requiring lessee to compel others on its premises to obey regulations for "the reimbursement of the Port Authority

of capital or operating costs incurred or anticipated in connection with improvements benefiting users of the Port Authority facilities." Any dispute over the significance of this language is a legal dispute, rather than an issue of fact.

99. The lease issued by the Port Authority to NYCT provides that the Lessee "agrees to observe and obey (and to compel . . . others at the Facility with its consent to observe and obey) the Rules and Regulations of the Port Authority now in effect, and such further reasonable rules and regulations (including amendments and supplements thereto)." Zantal Decl. ¶9 & Ex. 4 (NYCT Lease No. HHT-4, dated June 30, 1995, available at http://www.panynj.gov/corporate-information/pdf/port-lease-howland-hook.pdf) ¶12(a).

Complainants' Response: No dispute as to material facts; the quoted lease speaks for itself. The Port cut the quoted sentence short to omit limiting language; the clause actually states:

> The Lessee covenants and agrees to observe and obey (and to compel its officers, employees and others at the' Facility with its consent to observe and obey) the Rules and Regulations of the Port Authority now in effect, and such further reasonable rules and regulations (including amendments and supplements thereto) for the government of the conduct and operations of the Lessee as may from time to time during the letting be promulgated by the Port Authority for reasons of safety, health, or preservation of property, or for the maintenance of the good and orderly appearance of the Facility, or for the safe or efficient operation of the Facility.

The NYCT Terminal lease does not include the clause in the Global Terminal lease requiring lessee to compel others on its premises to obey regulations for "the reimbursement of the Port Authority of capital or operating costs incurred or anticipated in connection with improvements benefiting users of the Port Authority facilities." Any dispute over the significance of the language of this section is a legal dispute, rather than an issue of fact.

100. The lease issued by the Port Authority to PNCT provides that Lessee "agrees to observe and obey (and to compel . . . others on the premises with its consent to observe and obey) the Rules and Regulations of the Port Authority . . . promulgated by the Port Authority for reasons of safety, health, or preservation of property, or for the maintenance of the good and orderly appearance of the premises, or for the safe or efficient operation of the Facility." Zantal Decl. ¶9 & Ex. 6 (PNCT Terminal Lease No. L-PN-264, dated Dec. 1, 2000) (PACFC00056957-251) ¶12(a).

Complainants' Response: No dispute. The PNCT Terminal lease does not include the clause in the Global Terminal lease requiring lessee to compel others on its premises to obey regulations for "the reimbursement of the Port Authority of capital or operating costs incurred or anticipated in connection with improvements benefiting users of the Port Authority facilities." Any dispute over the significance of this language is a legal dispute, rather than an issue of fact.

The Port Authority's Investments in Infrastructure, Intermodal Transportation, and Security

101. The Port Authority has undertaken major infrastructure projects at the port for the benefit of the users of the port, including the construction of on-dock rail facilities and substantial improvements to the port's congested roadways. Zantal Decl. ¶10.

Complainants' Response: No dispute. Complainants have never asserted that the Port does not undertake major infrastructure projects, including those detailed in ¶¶102-110 *infra*. Objection regarding materiality of facts set out in in ¶¶102-110, as this case is not about whether the Port made infrastructure investments, but whether it is unlawful to allocate such costs to Complainants when they are not users of any particular services provided by the Port.

102. The Port Authority has invested and continues to invest more than $600 million in the development of the ExpressRail system. Zantal Decl. ¶¶10-11 & Ex. 7 (detailing the rail infrastructure improvements that the Port Authority has undertaken) (PA-CFC00019082-090) at 087-88, Ex. 8 ("2010 PANYNJ Port Guide," revised Sept 17, 2009) (PA-CFC00000239-255); see also Flyer/Shampine Supp. Decl., Appendix C (Compass Lexecon Report) (PA-CFC00000001-052) at 003.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

103. Prior to the development and operation of the ExpressRail system, containers had to be transported from the docks to off-dock rail terminals via truck. Zantal Decl. ¶11.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

104. The Port Authority has also made (and continues to make) major investments in roadway projects to increase roadway capacity, to reduce the high number of traffic accidents, reduce truck idling times, and mitigate the attendant negative environmental impact caused by idling. Zantal Decl. ¶¶10, 12 & Ex. 8 ("2010 PANYNJ Port Guide," revised Sept 17, 2009) (PA-CFC00000239-255) at 245, Ex. 7 (discussing specific roadway projects and detailing the rail infrastructure improvements that the Port Authority has undertaken) (PA-CFC00019082- 090) at 087-88.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

105. The Port Authority's roadway projects to increase capacity include the expansion of the Port Street, adding lanes to McLester Street, softening the North Avenue turn to reduce the

high number of traffic accidents, and other measures that reduce truck idling times and mitigate the attendant negative environmental impact caused by idling. Zantal Decl. ¶10, 13 & Ex. 8 ("2010 PANYNJ Port Guide," revised Sept 17, 2009) (PA-CFC00000239-255) at 245. The total estimated cost of these roadway projects is $83.9 million. Zantal Decl. ¶13 & Ex. 9 (PACFC00019910) (detailing the costs of the projects funded by the CFC and calculating the net present value of such projects) at 922.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

106. In the wake of the September 11, 2001 terrorist attacks, the Port Authority was federally mandated to expend substantial, additional sums for security improvements. Zantal Decl. ¶¶10, 14 & Ex. 10 ("Implementation of a Land-Side Access Infrastructure and Security Fee," dated August 2, 2010, noting post-9/11 incremental security costs in light of an "[u]nfunded federal security mandate") (PA-CFC00035866-877) at 871, Ex. 7 (stating that the safety and security component of the CFC will "[f]und [f]ederal security mandates") (PA-CFC00019082-090) at 086.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

107. The Port Authority invested more than $125 million over a seven-year period in post-9/11 security enhancements. Zantal Decl. ¶¶10, 14 & Ex. 8 ("2010 PANYNJ Port Guide," revised Sept 17, 2009) (PA-CFC00000239-255) at 251.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

108. The Port Authority's security enhancements include "put[ting] in place leading-edge technologies such as a closed-circuit system that integrates intelligent video, license plate readers, geospatial data and direct information downlinking." Id.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

109. The Port Authority's security enhancements also include implementing upgrades necessary to obtain certification in the U.S. Department of Homeland Security's Customs-Trade Partnership Against Terrorism program. Id.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

110. The Port Authority's aforementioned investments were designed to improve efficiency at the port by increasing landside access capacity, reducing congestion on port roadways, and improving security. Zantal Decl. ¶15.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

The Development of the CFC

111. In 2006, the Port Authority Port Commerce Department began the process of developing and then implementing a fair user fee that would recoup the Port Authority's investment in port improvements in an even-handed manner. Zantal Decl. ¶16 & Ex. 12 ("Port Authority of New York & New Jersey- User Fee Analysis," dated Jan. 23, 2006) (PACFC00045373-463) at 376-384, Ex. 13 ("2011-2013 Port Commerce Business Plan") (PA-CFC00043211-253) at 250; see also Complainants' Ex. 20 ("Port Commerce Department User Fees," dated Jan. 2, 2008) (PA-CFC00020412-417) at 414-415.

Complainants' Response: No dispute as to material facts. Objection with regard to the general characterization of the fee as "fair" and "even-handed," which are non-factual subjective opinions, and legal conclusions to the extent they go to the reasonableness of the fee. The 2006 User Fee Analysis (Zantal Decl. Ex. 12 at 40) states that [redacted] REDACTED

112. By 2008, the Port Authority's studies evolved, in part, into plans "to proceed with implementation of [a] Security Fee (SF)" that was designed to recover "incremental [Port Commerce Department] related security costs since 9/11." Zantal Decl. ¶17; see also Complainants' Ex. 20 ("Port Commerce Department User Fees," dated Jan. 2, 2008) (PA-CFC00020412-417) at 414-415.

Complainants' Response: No dispute. Objection as to materiality, see ¶101.

113. The Port Authority's studies further evolved into plans to implement a more comprehensive user fee structure that would allow the Port Authority to recoup the costs of rail and roadway improvements, in addition to post-9/11 security costs. Zantal Decl. ¶18.

Complainants' Response. No dispute regarding the fact that the Ports plans evolved to recoup rail and roadway-related funding. Objection to the characterization of the fee as a "user fee," to the extent it represents a legal opinion (*i e* , whether the fee violates, *inter alia*, the

Shipping Act, Tonnage Clause, Dormant Commerce Clause or 33 USC 5). The fee was more "comprehensive" in that it sought to extract more funds, but less "comprehensive" in that substituted a charge on carriers for the Rail Fee (see ¶114 *infra*), rather than charging all parties that benefit from Port investment. This is not a factual dispute; however, rather it is a core legal issue in the case.

114. Prior to the adoption of the CFC, the Port Authority had been assessing an "Intermodal Container Lift" fee, also known as the "Capital Recovery Fee" (the "Rail Fee") that was $57.50 in March 2011 when the CFC was first implemented, for each container that utilized the Port Authority's intermodal rail facilities, including the ExpressRail system. Zantal Decl. ¶19; see also Complainants' Ex. 26 (PA-CFC00040536-537).

Complainants' Response: No dispute. Prior to the CFC, the Port collected a user fee for rail facilities, rather than collecting money from non-users.

115. Also prior to the adoption of the CFC, the Port Authority had been assessing a volume-based annual Container Terminal Subscription Fee (the "Truck Fee") in connection with the SeaLink trucker identification system used for the interchange of containers between truckers or trucking companies and container terminals subsequent to unloading from the vessel or before loading onto the vessel. Zantal Decl. ¶20; see also Complainants' Ex. 10 (Tariff) at Subrule 34-810. Each terminal was assessed a fee ranging from $2,500 to $10,250 per calendar quarter based on each terminal's annual TEU volume. See Complainants' Ex. 10 (Tariff) at Subrule 34-810.

Complainants' Response: No dispute.

116. REDACTED

[redacted]

Complainants' Response: REDACTED

[redacted]

117. REDACTED

[redacted]

Complainants' Response: Objection, as the statement is unintelligibly vague; it does not identify who "agreed" or who "all of them" refers to.

118. In June 2010, the Port Authority proposed placing a cargo facility charge on all containers (loaded and empty), auto and bulk cargo passing through the Port, while simultaneously eliminating the Rail Fee and Truck Fee. See Zantal Decl. ¶22 & Ex. 14 (PA-CFC00019299) at 299.

Complainants' Response: Complainants do not dispute that the fee was proposed in June 2010. Objection that the Port paraphrases – and changes – the language of the cited proposal to better support its legal argument that the fee is levied on containers rather than cargo. The cited memorandum actually stated:

REDACTED

119. The Port Authority determined that the imposition of a single fee rather than three (i.e., a separate Rail Fee, Truck Fee and security fee) would "streamline [the] fee collection process" and more evenly and fairly distribute the costs of roadway, rail, and security improvements across cargo moving through the port. Zantal Decl. ¶¶15, 22-23 & Ex. 14 (PA-CFC00019299) at 299, Ex. 11 (undated "[d]raft of proposed response to CKYHU group in regard to 1/18/11 meeting") (PA-CFC00042970-974), Ex. 15 (Memorandum regarding "Container Facility Charge," dated Feb. 1, 2011) (PA-CFC00020998-005) at 003.

Complainants' Response: Complainants do not dispute the quoted description of the Port's alleged reasoning. Complainants object to the subjective and legal conclusion that it was in any way "fair" to charge an ocean common carrier for a service that carrier does not use. See ¶111.

120. The amount of the CFC was derived by spreading the costs to be recovered over the projected cargo traffic for the twenty-five-year period ending in 2035. Zantal Decl. ¶24.

Complainants' Response: No dispute.

121. In calculating the CFC rates, the Port Commerce Department forecast the expected volume of cargo containers, non-containerized cargo and vehicles over that twenty-five-year period, and apportioned the unrecovered cost of the ExpressRail and the expected costs of the roadway projects, so that the costs of the rail and roadway projects as well as a percentage of the total cost of post-9/11 security upgrades would be assessed on cargo passing through the port's improved infrastructure in an equitable manner. Zantal Decl. ¶25.

Complainants' Response: No dispute that the Port projected and apportioned costs. Objection to the subjective and legal conclusion regarding the "equitable" nature of the fee.

122. The Port Commerce Department used a starting point of 25% of the security fee, REDACTED Zantal Decl. ¶26.

Complainants' Response: No dispute as to material facts. Objection with regard to vagueness and "the full security fee" is undefined, and relevance, as there is no indication what particular security service was being provided.

123. The CFC went into effect only lengthy consideration and careful analysis by the Port Authority Port Commerce Department, which recognized the need to ensure that the contemplated fee would recoup the investment in port improvements in an even-handed manner. Zantal Decl. ¶¶16, 23, 27 & Ex. 12 (PA-CFC00045373-463), Ex. 15 (PA-CFC00020998-005); see also Flyer/Shampine Supp. Decl., Appendix C (PA-CFC00000001-052); Complainants' Ex. 25 (PA-CFC11063-069); Complainants' Ex. 27 (PA-CFC00040541-543).

Complainants' Response: Objection in that the statement fails to state a material fact and expresses a self-serving subjective opinion and legal conclusion.

124. Before adopting the CFC, the Port Authority internally analyzed the benefits of the projects funded by the CFC to users of the port, and specifically to ocean common carriers that are generally responsible for the movement of cargo containers through the port. Zantal Decl. ¶28; see also Complainants' Ex. 25 (undated Memorandum regarding "Cargo Facility Infrastructure Charge Marketing Plan & Strategy for Container Ocean Carriers," itemizing

numerous benefits that projects funded by the CFC confer on ocean carriers) (PA-CFC11063-069) at 065.

Complainants' Response: Complainants do not dispute that Port Authority internally analyzed the benefits of the projects funded by the CFC to users of the port, and specifically to ocean common carriers. The analysis in the cited Memorandum states: REDACTED

Complainants object to the ambiguous general assertion that "ocean common carriers [are] generally responsible for the movement of cargo containers through the port," as it is inconsistent with the Port's statement (not in dispute) at ¶149-150 *infra*. As explained by the Port in the Kobza Decl. ¶¶9-12, an ocean carrier is not "generally responsible for the movement of cargo containers through the port," rather "an ocean common carrier is responsible for the carriage of cargo containers and/or non-containerized cargo from the initial port terminal, onto vessels for transport across the ocean, and up through the point at which the containers are unloaded from the vessel at the destination port." Id. at ¶11. "When the carrier's contract with a BCO calls for through transportation (or door-to-door transportation), the carrier remains responsible for coordinating the movement of the cargo container (or non-containerized cargo) until it reaches its final destination. . . ." Id. at 12. See ¶149-150 *infra*.

125. According to the Port Authority's studies, the CFC "would provide needed road and rail capacity as well as a more environmentally sustainable and efficient Port by decreasing congestion on the port roadways and terminals by either removing trucks from the roadway and

putting them on rail or increasing roadway capacity and mitigating the environmental impact of on-port idling caused by congestion." See Complainants' Ex. 27 (Memorandum regarding "Port Authority of New York & New Jersey Cargo Facility Charge," dated Oct 16, 2010) (PA-CFC00040541-543) at 541; see also Zantal Decl. ¶28.

Complainants' Response: No dispute as to the citation of the memorandum. Objection to the relevance of the statement as Complainants do not contest the projected benefits to road users, rail capacity, or the region's environment, but rather base their claim on the fact that they are made to pay for services which they do not use, while beneficiaries of the described road, rail and environmental benefits are not subject to the fee.

126. In addition to internal analyses, the Port Authority engaged economics experts from Compass Lexecon to study the benefits from the Port Authority's on-dock ExpressRail infrastructure projects to carriers primarily utilizing trucks for inland transportation, including the shift of a portion of the inland movement of cargo from truck to rail, and the attendant decrease in roadway congestion and truck waiting time. Zantal Decl. ¶29; see also Flyer/Shampine Supp. Decl., Appendix C (Compass Lexecon Report) (PA-CFC00000001-052) at 003.

Complainants' Response: No dispute that Compass Lexecon was engaged. The statement that they were engaged to study the benefits "to carriers" is contradicted by the text of the report, which states: "We have been asked by counsel for the Port Authority to analyze the benefits of the Port Authority's ExpressRail system to shippers using trucks to transport containers." Flyer/Shampine Supp. Decl., Appendix C (Compass Lexecon Report) (PA-CFC00000001-052) at 003. (Emphasis added).

127. On December 9, 2010, Compass Lexecon issued a report, which concluded that the reduced roadway congestion resulting from the ExpressRail infrastructure projects reduced the transportation costs per cargo container transported by truck by far more than the amount of the CFC, and that those benefits were likely to increase further as a result of additional traffic moving to ExpressRail because of the restructuring of the cost recovery fees. See Zantal Decl. ¶29; see also Flyer/Shampine Supp. Decl., Appendix C (Compass Lexecon Report) (estimating that "the savings appear to be conservatively in the range of $21.42 to $25.52 per container - substantially larger than the [CFC of] $8.42 per container fee") (PA-CFC00000001-052) at 029.

Complainants' Response: No dispute of material facts. The cited Compass Lexecon Report conclusions made no mention of any benefits to ocean common carriers whatsoever, instead addressing only savings to shippers.

128. The Port Authority filed its proposed revisions to the Tariff-which would allow it to assess a cargo facility charge on all cargo containers and non-containerized cargo transported through the port-with the Port Authority Board of Commissioners and made those revisions publicly available for two separate 30-day comment periods. See Zantal Decl. ¶30 & Ex. 17 ("Cargo Facility Charge- Implementation Process / Issues to Date," dated March 7, 2011) (PA-CFC00019099-101) at 100.

Complainants' Response: No dispute as to material facts; objection as to relevance.

129. Between December 2010 and February 2011, the Port Authority also held numerous meetings with ocean carriers (including the Complainants), terminal operators and

others to discuss the proposed Tariff, and provided multiple opportunities for comment that led to certain revisions to the CFC before final implementation. Zantal Decl. ¶¶30, 31 & Ex. 17 ("Cargo Facility Charge- Implementation Process / Issues to Date," dated March 7, 2011) (PA-CFC00019099-101) at 100, Ex. 18 (Memorandum summarizing March 16, 2011 PANYNJ meeting to discuss CFC, which "K" Line, Hanjin, UASC, and NYK attended) (PACFC00019572-574).

Complainants' Response: No dispute as to material facts. Objection as to relevance; whether Port conferred with various parties is not material to the question of whether the fee and its enforcement is lawful under the Shipping Act.

130. The Port Authority revised the CFC to reflect comments from ocean carriers and MTOs concerning the CFC. Zantal Decl. ¶¶30, 32 & Ex. 17 (Memorandum regarding "Cargo Facility Charge- Implementation Process / Issues to Date," dated March 7, 2011) (PACFC00019099-101) at 100. In particular, the Port Authority agreed to generate monthly invoices for each individual ocean carrier as opposed to having the terminal operators bill the ocean carriers directly. Zantal Decl. ¶32; see also Complainants' Ex. 12 (PA-CFC00064426).

Complainants' Response: No dispute.

131. The CFC became effective on March 14, 2011, at which time the Port Authority eliminated the Rail Fee and the Truck Fee. See Zantal Decl. ¶33; see also Complainants' Ex. 10 (Tariff) at Subrule 34-1200, et seq.; Answer, Admission to IV. C at p. 5; Compl., The Facts, IV. C., at p. 5.

Complainants' Response: No dispute.

Complainants' Business Enterprises

132. Ocean common carriers, including Complainants, move cargo containers and non-containerized cargo across the ocean using their own vessels, or they may arrange to have their cargo containers (or non-containerized cargo) transported on the vessels of other carriers pursuant to a vessel sharing agreement, slot charter, or other arrangement. Kobza Decl. ¶9.

Complainants' Response: No dispute.

133. Ocean common carriers like Complainants almost always either own or lease the cargo containers against which the CFC is charged. Kobza Decl. ¶7.

Complainants' Response: No dispute that ocean common carriers own or lease containers (but not all containers) moving through the port. Objection to the relevance of the statement, as the CFC is collected from the ocean common carrier without any determination of (or recourse against) the actual owner or lessee of a container or the cargo therein. With regard to the assertion that the CFC is charged on cargo containers, see ¶¶ 20, 22 *supra;* see also Zantal Decl. Ex. 19 (Port Authority's Board Meeting Minutes, dated December 7, 2010) (recommending to the Board a "cargo based infrastructure and security fee. . . applicable to waterborne cargo discharged from or loaded onto vessels") (PA-CFC00042158-160) at 158, Ex. 15 (Port Authority Memorandum, dated February 1, 2011) (PA-CFC-00020998-005) at 998-999 REDACTED The extent to which the "Tariff" language is ambiguous, and the effect thereof, are legal determinations, not factual disputes.

134. Carriers often maintain control of the containers movements after they are unloaded from the vessels, and are responsible for the continued movement of those containers through the port and to their final destination. Id.

Complainants' Response: There is no dispute that "carriers often maintain control of the containers movements after they are unloaded from the vessels." Complainants object to the ambiguous general assertion that ocean common carriers "are responsible for the continued movement of those containers through the port," as it in inconsistent with the Port's statement (not in dispute) at ¶149-150 *infra*. Complainants offer through transportation (i.e., service to an inland point) in some instances, but for other shipments their responsibility begins and ends when the cargo is loaded or unloaded from the vessel. See ¶124 *supra* Objection as to relevance; the control of containers is not relevant to the legal test for evaluating the lawfulness of the charge assessed on Complainants.

135. With the aide of their wholly-owned subsidiaries and according to their own websites, Complainants provide "comprehensive logistics services," which "connect[] every city via major ports" via "rail, truck and feeder." See Collins Decl. ¶3 & Ex. B (printouts from Hanjin's website), Ex. B (printouts from "K" Line's website) (noting that "K" Line's subsidiaries "'K' Line Logistics, Ltd. (KLL), Air Tiger Express (ATE) and Century Distribution Systems (CDS) are at the center of [K's Line's] international logistics business"), Ex. B (printouts from NYK's website), Ex. C (printouts from Yang Ming's website), Ex. D (S&P Capital IQ Reports for Complainants' subsidiary logistics companies); see also Opp. to MTC (conceding that Complainants "have affiliates that perform logistics services") at 4.

Complainants' Response: There is no dispute of material fact. Complainants have indicated that they have affiliates that perform logistics services, which affiliates include the companies listed above. Objection as to relevance and materiality, as the CTC is not charged to logistics providers or companies performing rail or trucking services; rather, it is only extracted from ocean common carriers. Whether Complainants have affiliates offering logistics services has no discernible link at all to the legal issues in this docket. Further object to the Port's legal characterization of any affiliate relationship as a "wholly owned subsidiary."

136. Complainant Hanjin offers a "comprehensive network of logistics and intermodal services" that "connect[] every major city via major ports." Collins Decl. ¶3 & Ex. B (printouts from Hanjin's website).

Complainants' Response: *See* ¶135 *supra.*

137. Complainant "K" Line offers "comprehensive logistics services." Collins Decl. ¶3 & Ex. B (printouts from "K" Line's website).

Complainants' Response: *See* ¶135 *supra.*

138. Complainant "K" Line's subsidiaries - "K" Line Logistics, Ltd., Air Tiger Express, and Century Distribution Systems - "are at the center of [its] international logistics business." Collins Decl. ¶3 & Ex. B (printouts from "K" Line's website).

Complainants' Response: *See* ¶135 *supra.*

139. Complainant NYK has "logistics business units inside every field of transportation (sea, land, air) . . . and other logistics services." Collins Decl. ¶3 & Ex. B (printouts from NYK's website).

Complainants' Response: *See* ¶135 *supra.*

140. Complainant UASC also has arrangements governing intermodal transportation of cargo containers. See Collins Decl. ¶21 & Ex. T (http://highmountaintransport.com/Per%20Diem%20Document[1].pdf) (detailing the terms and rates governing motor carriers use and transportation of cargo containers owned or controlled by UASC pursuant to the Uniform Intermodal Interchange and Facilities Access Agreement). Complainant Yang Ming, by way of its subsidiary YES Logistics Corporation, provides clients with "sea/air freight forwarding and integrated logistics services" and "professional, effective and total logistics services around the world." Collins Decl. ¶4 & Ex. C (printouts from Yang Ming's website describing logistics services provided).

Complainants' Response: *See* ¶135 *supra.*

Administrative Reasons for Collecting the CFC from Carriers

141. By imposing the CFC on carriers when the cargo containers (or non-containerized cargo) are loaded onto or unloaded off of a vessel, the Port Authority ensures that all cargo containers and non-containerized cargo that move through the port are equitably accounted for (but not double counted). Zantal Decl. ¶47.

Complainants' Response: No dispute that the CFC is imposed when cargo containers or non-containerized cargo are loaded onto or unloaded off of a vessel. Complainants object to the

characterization that the cargo is "equitably unaccounted for"; to the extent the subjective assessment of equity is relevant, it is an issue of law, not fact.

142. Depending on the distance from the origination and/or destination point to the port, the cargo container might move by truck, rail, or a combination of the two before or after being loaded onto or unloaded from a ship. Trying to assess the fee at any point other than when the cargo container is loaded or unloaded would increase the administrative burden, decrease the accuracy of assessing the fee, and increase the likelihood that the fee would be assessed unequally on cargo containers and non-containerized cargo. See Zantal Decl. ¶46.

Complainants' Response: No dispute that a cargo container might move by truck, rail, or a combination of the two before or after being loaded onto or unloaded from a ship. Objection that the view that "[t]rying to assess the fee at any point other than when the cargo container is loaded or unloaded would increase the administrative burden, decrease the accuracy of assessing the fee, and increase the likelihood that the fee would be assessed unequally on cargo containers and non-containerized cargo" is not a material fact, but rather a vague, speculative, and self-serving opinion, particularly as the Port does not clarify what the alleged burdens would be, what is meant by "accuracy" and "unequally," and what particular alternatives are being compared. The Port's vague opinions about unspecified other options are not relevant in assessing the fee at issue; a port's effort to minimize its own costs or administrative burdens is not a factor that has been cited by the Commission in adjudicating the reasonableness of port charges.

143. In light of existing business relationships between the MTOs and the ocean carriers, the most efficient, least disruptive way for the Port Authority to collect the CFC on a per

container basis is to have the MTOs bill the ocean carriers directly and remit amounts received to the Port Authority. See Zantal Decl. ¶48; see also Complainants' Ex. 9 (Memorandum regarding "Cargo Facility Charge," dated March 7, 2011) (PA-CFC00020462-463) at 462.

Complainants' Response: No dispute that there are business relationships between carriers and MTOs. The view that "least disruptive way for the Port Authority to collect the CFC on a per container basis is to have the MTOs bill the ocean carriers directly and remit amounts received to the Port Authority" is a vague and speculative opinion, insofar as the Port does not clarify what the is meant by "efficient" and "disruptive," and what particular alternatives are being compared. Complainants do not dispute that the Port sees the current CFC collection as the most efficient and least disruptive option for the Port itself. In any event, the Port's vague opinions about unspecified other options are not a material fact in assessing the fee at issue. *See* ¶142 *supra*.

144. The terminal operators-which already had a process for invoicing and collecting fees from the carriers when the CFC went into effect- track each carrier's loading and unloading activities at their terminals and enable the Port Authority to collect the CFC efficiently. See Zantal Decl. ¶49.

Complainants' Response: No dispute as to material facts. Complainants object to the Port's vague and undefined opinion about collecting the CFC "efficiently," and to relevance, as the ease of collecting a charge (using threats to block cargo handling services) is not a factor in assessing the lawfulness of such charges.

145. By using the existing administrative structures already in place at the MTOs to account for and collect the CFC, the Port Authority saves administrative expenses, which means that it does not need to increase the CFC rate to cover the higher administrative costs of a less efficient system. See, e.g., Zantal Decl. ¶¶49-50 & Ex. 22 [redacted] REDACTED [redacted] (PA-CFC00020511-515) at 513.

Complainants' Response: No dispute as to material facts. Complainants object to the speculative reference to a hypothetical future "need" to increase the CFC, and the vague and subjective reference to the current fee as "efficient." The Port's subjective opinions regarding efficiency of its own administrative processes are not a material issue of fact.

146. Carriers contract directly (or through their own subsidiaries) with all the other major players involved: the beneficial owners of the cargo; the terminal operators and stevedores that load and unload the vessels; and the rail and motor carriers that move cargo through the port and inland. See Kobza Decl. ¶14.

Complainants' Response: No dispute, with the clarification that (as noted in the Kobza Decl. ¶13) carriers at times contract with non-vessel-operating common carriers ("NVOCCs") rather than beneficial cargo owners.

147. Complainants' and other carriers' position at the hub of the movement of cargo through the port puts them in the best position either to absorb the CFC themselves or to allocate it to others in the chain as they see fit, by adjusting the rates they charge their own customers or the rates they pay to rail and motor carriers for inland transport. See Kobza Decl. ¶17.

Complainants' Response: Complainants have no dispute with the specific description of their commercial role and operations set out in the Kobza Declaration, e.g., ¶¶9-13. The Port's reference to carriers at "the hub of the movement of cargo through the port puts them in the best position either to absorb the CFC themselves or to allocate it to others in the chain as they see fit" is a vague, ambiguous and self-service display of mixed metaphors (insofar as "chains" do not have "hubs"). Objection to vague, subjective and legal conclusion; whether the Port views the current system as placing carriers in the "best position" is not a material issue of fact.

148. Depending on the specific arrangements with each beneficial cargo owner ("BCO"), Complainants often are responsible for coordinating some, or all, of the inland movement of the containers (e.g., transportation by truck and/or rail). See Kobza Decl. ¶10.

Complainants' Response: No dispute as to material facts.

149. Under the terms of its contracts with the BCO, an ocean common carrier is responsible for the carriage of cargo containers and/or non-containerized cargo from the initial port terminal, onto vessels for transport across the ocean, and up through the point when the cargo is loaded onto or unloaded from the vessel at the destination port. See Kobza Decl. ¶11.

Complainants' Response: No dispute.

150. When the carrier's contract with a BCO calls for through transportation (or door-to-door transportation), the carrier remains responsible for coordinating the movement of the cargo container (or non-containerized cargo) until it reaches its final destination by ground transport. See Kobza Decl. ¶12. But even if the contract calls for only port-to-port transportation, if the cargo container requires rail transport, the carrier almost always remains responsible for coordinating the transportation of the cargo container by rail until it reaches its final railhead, at which point it is loaded onto a truck (arranged for by the shipper) bound for the final destination. Id.

Complainants' Response: No dispute.

151. Carriers have agreements with other parties in the logistical chain (such as terminal operators, stevedores, motor carriers, rail carriers, and their own subsidiary logistics companies) to facilitate the inland transportation that the carriers agree to provide for the BCOs. See Kobza Decl. ¶14; see also Collins Decl. ¶16 & Ex. 0 (CA-HJ-08007) ¶17 & Ex. P (CAHJ-08014).

Complainants' Response: No dispute. As explained in the Kobza Decl. ¶¶9-12, ocean common carriers at times may provide service to or from a port, and at other times may provide a through service to an inland point (by contracting with inland carriers).

152. Carriers, including Complainants, stand at the very center of the economic and logistical transport chain in which shippers, carriers, intermediaries, trucking companies, and rail

carriers move cargo containers and/or non-containerized cargo through the Port of New York and New Jersey.

Complainants' Response: No dispute that carriers are part of supply chains. The Port's reference to "the very center of the economic and logistical transport chain" is a vague, subjective and poorly crafted metaphor, rather than a statement of material fact. Objection as to relevance, as where a party stands in any particular supply chain is not a factor that has been cited by the Commission in determining whether port fees are properly allocated to that party.

153. In negotiating these contracts, carriers can allocate the economic benefits realized from efficiencies created by the CFC-funded projects. See Kobza Decl. ¶14.

Complainants' Response: No dispute to the point that carriers and their counterparties seek to allocate benefits in negotiating contracts. Objection with regard to relevance, insofar as the issue of whether particular parties can use contracts to allocate benefits is not relevant to the Commission's legal review of port fees.

154. Carriers can and do routinely pass the costs of tariffs and other expenses on to the BCOs and other stakeholders in the form of surcharges. See Kobza Decl. ¶18; see also Collins Decl. Ex. A [redacted] Ex. G (CA-HJ-06572), Ex. I (CA-HJ-06644), Ex. J (CA-HJ-06645), Ex. H (CA-HJ-06458), Ex. K, (CA-HJ-006706), Ex. L (CA-HJ-006801), Ex. M (CA-HJ-007036), Ex. N (CA-HJ-007075), Ex. Q (CA-KL-003084), Ex. R (CA-YM-002010-030) at 019, Ex. S (CA-NYK-000530).

Complainants' Response: No dispute, provided that the Port's statement should not be read to mean that costs are passed through via surcharges in all instances. In general, while carriers can and do pass the costs of tariffs and other expenses on some circumstances, in other circumstances they cannot or do not. Objection with regard to relevance and materiality, as the issue of whether a carrier can pass a charge on to a shipper is not part of the Shipping Act test for determining the reasonableness of that charge.

155. For example, Hanjin and Yang Ming have levied "congestion" surcharges on their customers as compensation for congestion-related delays at U.S. ports. See Collins Decl. Ex. E (http://www.agtrans.org/-agtrans7/images/stories/ports/yang%20ming%2Ocustomer%20advisory .pdf), Ex. F (http://www.nscontainer.com/hanjin-announces-lalgb-congestion-surcharge/).

Complainants' Response: No dispute. Objection with regard to relevance and materiality, as the issue of whether a carrier can pass a charge on to a shipper is not part of the Shipping Act test for determining the reasonableness of that charge.

156. **REDACTED**

Complainants' Response: No dispute. REDACTED

157. REDACTED

Complainants' Response: No dispute. REDACTED

Benefits of CFC-Funded Projects to Carriers, Including Complainants

158. Given their central role in the movement of cargo through the port, Complainants benefit from the Port Authority's provision of facilities, infrastructure, intermodal transportation networks, and security that allow carriers that use either leased or public terminal space at the port to transport cargo containers and non-containerized cargo more quickly, safely, and efficiently. Kobza Decl. ¶19; see also Mot. for J. at 13; Opp. to MTC at 4.

Complainants' Response: No dispute of material facts. Complainants have never disputed that they derive benefits from the existence of Port infrastructure. The question of

whether Complainants benefit from the Port's infrastructure is not relevant to the issue at hand, whether it is lawful to allocate the cost of such infrastructure to Complainants, when so service is provided in exchange for the fee, and other beneficiaries are not charged. Further, object to vague opinion regarding carriers' "central role in the movement of cargo through the port." Also the Port itself explains, complainants offer through transportation in some instances, but in others the ocean carrier's responsibility begins and ends when the cargo is loaded or unloaded from the vessel. *See* ¶124.

159. The additional port security funded by the CFC reduces the risk of damage to Complainants' property (including the cargo containers). Zantal Decl. ¶42. The additional port security funded by the CFC also reduces the risk of theft or sabotage of cargo, for which Complainants may become responsible to the cargo owners. Id.

Complainants' Response: No dispute, with the clarification that port security reduces risks not solely to Complainants but to other parties as well.

160. The Port Authority's construction of the on-dock ExpressRail, which is also funded by the CFC, has improved the efficiency with which Complainants can transport cargo containers through and beyond the port by rail by eliminating the extra step of transporting cargo containers from the dock to the off-port railway. Zantal Decl. ¶43.

Complainants' Response: No dispute. Objection regarding relevance, insofar as the issue in the case is not whether ExpressRail has improved efficiency, but whether non-users can be charged a fee for it.

161. The availability of the ExpressRail, together with the expansion of the port's roadway capacity, reduces congestion on port roadways, thereby reducing the costs associated with moving cargo containers by truck. Id.

Complainants' Response: No dispute. Objection regarding relevance, insofar as the issue in the case is not whether ExpressRail has reduced congestion, but whether ocean common carriers can be charged a fee for it if they are not providing inland transport, and direct beneficiaries of decreased congestion (trucks, motorists, cargo interests) are not required to pay.

162. The Port Authority's roadway projects, including widening certain areas, have reduced accidents which are costly not only to those directly involved, but also to other port users because of the traffic and congestion they create. See Zantal Decl. ¶44; see also Flyer/Shampine Supp. Decl., Appendix C (Compass Lexecon Report) (PA-CFC0000001-052) at 003.

Complainants' Response: No dispute as to material facts. Objection as to relevance. See ¶161 *supra.*

163. The independent economists hired by the Port Authority concluded that the economics indicate that the substantial benefits the carriers receive from the ExpressRail system alone likely exceed the fees imposed on them through the CFC. See Flyer/Shampine Decl., Appendix C (Compass Lexecon Report) (concluding that the benefits from the CFC "appear to be conservatively in the range of $21.42 to $25 33 per container - substantially larger than the $8.42 per container fee") (PA-CFC00000001-052) at 30.

Complainants' Response: No dispute as to the dollar amount of benefits projected. However, the cited passage Compass Lexecon Report makes no mention of benefits to carriers; rather, it makes a projection only of benefits to shippers who are not targeted by the CFC at all.

164. Compass Lexecon's prepared a supplemental report, which confirms that "the carriers receive economic benefits, some of which we have quantified in our prior declaration, from the ExpressRail system, roadway improvements and security enhancements funded by the CFC." Flyer/Shampine Supp. Decl. ¶8.

Complainants' Response: No dispute as to the quotation. Regarding the reference to "economic benefits, some of which we have quantified in our prior declaration": all the benefits which were quantified in the prior declaration were described as benefits to shippers and end consumers; there was no discussion of benefits to carriers. See Flyer/Shampine Decl., Appendix C (Compass Lexecon Report) at 10-12. Only in this latest declaration have Compass Lexecon tried to deal with their prior testimony by re-ascribing the previously described shipper benefits to carriers.

165. Specifically, Compass Lexecon concluded that carriers benefit from ExpressRail when they arrange container moves through the port via truck, because the reduced costs associated with expedited travel times through the port exceed the fee imposed by the CFC. Flyer/Shampine Supp. Decl. ¶11.

Complainants' Response: No dispute as to Compass Lexecon's conclusion. Objection as to relevance. See ¶161 *supra*.

166. Compass Lexecon also noted that because the trucking industry is highly competitive, any savings experienced by truckers would be passed on to those engaging trucking services, i.e., the carriers. Flyer/Shampine Supp. Decl. ¶12. Even in instances where the cargo owner, rather than the carrier, engages the trucking services, the reduction in trucking costs nonetheless benefits carriers by allowing them to increase their pricing (including passing through the full amount of the CFC), while still offering a lower total cost to the cargo owner than would exist in the absence of the infrastructure improvements. Flyer/Shampine Supp. Decl. ¶¶13-14.

Complainants' Response: No dispute that the statement reflects the Flyer/Shampine Supplemental Declaration. Objection as to relevance, as theoretical speculation that all carriers could raise prices without reducing customers' demand is not relevant to the legal test for reasonableness of port charges.

167. Compass Lexecon further noted that the estimated cost reduction of $21 to $25 per container was conservative because it measured only some of the benefits from only some of the projects and services funded by the CFC. Flyer/Shampine Supp. Decl. ¶12 ("Our estimates of the amount of benefits received in connection with the CFC-funded projects and activities are conservative because our prior declaration looked at only part of the benefits (excluding, for example, the benefits from reducing the number of accidents) and because the CFC as implemented subsequent to our prior declaration funds a broader range of projects than just ExpressRail, including direct road improvements and security enhancements. We understand that the roadway infrastructure improvements, which also are associated with the CFC, are

specifically intended to provide further reductions in congestion, travel time and truck idling time.").

Complainants' Response: No dispute as to material facts. Objection as to relevance. See ¶161 *supra*.

168. Compass Lexecon concluded that the ExpressRail system and roadway infrastructure projects funded by the CFC provide transportation efficiencies at the port, which provide direct and quantifiable economic benefits to the carriers, including Complainants that are "well in excess of the level of the CFC." Id.

Complainants' Response: No dispute as to material facts. Objection as to relevance. See ¶161 *supra*.

Dated: February 15, 2013

Respectfully submitted,

John P. Meade
"K" Line America, Inc.
6009 Bethlehem Road
Preston, MD 21655
(410) 673-1010
john.meade@us.kline.com

Matthew J. Thomas
Reed Smith LLP
1301 K Street, N.W.
Suite 1100-East Tower
Washington, DC 20005
(202) 414-9257
mthomas@reedsmith.com

Counsel for Complainants

CONFIDENTIAL MATERIAL EXCLUDED

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Complainants' Response to Respondent's Opposition to Complainants' Motion for Judgment and Complainants' Reply to Port Authority's Response to Complainants' Statement of Facts Not in Dispute and Port Authority's Statement of Additional Facts to be served this 15th day of February, 2013, via e-mail and UPS, upon the following:

Richard A. Rothman
Jared Friedman
Reed Collins
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
richard.rothman@weil.com
jared.friedmann@weil.com

Peter D. Isakoff
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, N.W.
Suite 900
Washington, D.C. 20005
peter.isakoff@weil.com
alex.levine@weil.com

Ashley W. Craig
David G. Dickman
Elizabeth Lowe
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20005
awcraig@venable.com
dgdickman@venable.com
ldeade@venable.com

Counsel for Respondent

Matthew J. Thomas